80-2095

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IN THE

Supreme Court of the United States

OCTOBER TERM 1980

No. .....

NEW YORK SHIPPING ASSOCIATION, INC., COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, ATLANTIC COAST DISTRICT, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,

Petitioners,

v.

WILLIAM A. PASCARELL, Acting Regional Director of the Twenty-Second Region of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Questions Presented

This case presents for adjudication several significant questions, never previously decided by this Court, relating to the application of §10(l) of the National Labor Relations Act which, as Justice Harlan observed in an earlier case, "has not heretofore been passed upon by this Court and is of continuing importance in the proper administration of the Labor Act." Solicitor General's Pet. for Cert. at 12, *McLeod* v. *General Electric Co.*, 366 F.2d 847 (2d Cir. 1966), *vacated as moot*, 385 U.S. 533 (1967) (U.S. No. 66-645, filed Oct. 7, 1966). These questions are:

1. Whether the mere presentation by a Regional Director of the National Labor Relations Board of a theory of law that is not "frivolous and insubstantial" is a sufficient showing of "reasonable cause" mandating the issuance of an injunction under §10(l) of the National Labor Relations Act, even though the district court determines that the basic theory of law advanced by the Regional Director is erroneous?

2. Whether a finding of "reasonable cause" requires the automatic issuance of a 10(l) injunction without any separate and independent consideration by the district court of whether the requested injunctive relief is "just and proper"?

3. Whether the Third Circuit's rule, which requires a district court without any consideration of the equities to grant a 10(l) injunction merely upon a finding that the Regional Director's legal theory is not "frivolous and insubstantial," violates Article III of the Constitution of the United States by depriving the court of any adjudicatory function and delegating its judicial power to an organ of the executive branch?

4. Whether, in a case on remand to the National Labor Relations Board from a circuit court of appeals, the appellate court retains exclusive jurisdiction under §§ 10(e) and 10(f) of the National Labor Relations Act, foreclosing a district court's exercise of §10(l) jurisdiction?

Parties

In addition to petitioners and respondent, charging parties American Trucking Associations, Inc., International Association of Non-Vessel Operating Common Carriers and Twin Express, Inc. were granted leave to appear as amici curiae in the court of appeals. Corporate petitioner New York Shipping Association, Inc. has one subsidiary, Atlantic Cargo Inspection Bureau, Inc. None of the other petitioners has any parent corporation or subsidiary.

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IN THE

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No. .....

NEW YORK SHIPPING ASSOCIATION, INC., COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, ATLANTIC COAST DISTRICT, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,

Petitioners,

v.

WILLIAM A. PASCARELL, Acting Regional Director of the Twenty-Second Region of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners New York Shipping Association, Inc. ("NYSA"), Council of North Atlantic Shipping Associations ("CONASA"), International Longshoremen's Association, AFL-CIO ("ILA") and Atlantic Coast District, International Longshoremen's Association, AFL-CIO respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

Opinions Below

The opinion of the court of appeals, not yet reported, is reproduced in the separately bound appendix to this petition (App. A at 1a-8a). The opinion of the United States District Court for the District of New Jersey, which was rendered orally from the bench on February 23, 1981, is not reported. The district court's opinion is also reproduced in the appendix (App. C at 19a-20a, 21a, 24a, 33a-36a, 39a-40a, 47a, 55a, 79a, 84a-91a, 121a-127a, 131a-132a, 135a-136a, 138a, 141a-142a, 157a-158a, 160a-162a, 163a, 164a-166a, 169a, 170a-171a, 176a-192a, 198a, 202a).[1]

Jurisdiction

The judgment of the court of appeals (App. B at 9a-10a) was entered on May 20, 1981. This petition is filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Statutes Involved

The relevant constitutional and statutory provisions are U.S. Const., art. III, §1 and §10(l) of the National Labor Relations Act (NLRA), 29 U.S.C. §160(l). The text of these provisions is set forth verbatim in the separately bound appendix (App. D at 207a-208a).

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[1] Since the district court's reasoning was expressed at different stages of the proceedings held on January 5, January 12 and February 23, 1981, Appendix C contains the entire transcript of these proceedings. The citations in the text to Appendix C refer to statements of the district court which may properly be considered part of its opinion.

Statement of the Case

Nature of the Case

This case involves a special statutory proceeding under NLRA §10(l) for a preliminary injunction prohibiting the implementation of collectively bargained work rules, known as the Rules on Containers, pending adjudication by the National Labor Relations Board ("NLRB" or "Board") of their legality under federal labor law.

The Rules are the negotiated response of the ILA and the multi-employer associations in the shipping industry, including NYSA and CONASA, to the technological displacement of longshore work occasioned by the shipping employers' increasing use of automated cargo handling techniques, known as containerization. All the relevant facts in this case have already been definitively established in the opinions of this Court and the District of Columbia Circuit in *NLRB* v. *International Longshoremen's Association ("ILA")*, 447 U.S. 490 (1980), *aff'g* 198 U.S. App. D.C. 157, 613 F.2d 890 (1979). These facts will not be repeated.

History of Litigation

This case arose in the wake of the *ILA* decision by this Court which overturned a series of prior erroneous NLRB determinations that the Rules on Containers were a hot cargo agreement violating NLRA §8(e), 29 U.S.C. §158(e), and that their implementation contravened the secondary boycott proscriptions of NLRA §8(b)(4), 29 U.S.C. §158(b)(4).[2] The Court remanded *ILA* to the Board for recon-

[2] Since 1973, implementation of the Rules on Containers, which were adopted in 1969 with the assistance of a presidential mediator, has been restrained by court decrees. *See, e.g., Int'l Longshoremen's Ass'n* v. *NLRB*, 537 F.2d 706 (2d Cir. 1976), *cert denied*, 429 U.S. 1041 (1977), *vacated and remanded*, No. 75-4266 (2d Cir. 1980) (cease and desist order on the merits); *Hirsch* v. *Int'l Long-*

sideration guided by "a proper understanding of the work at issue." 447 U.S. at 511.[3]

Counsel for petitioners urged the Board's General Counsel to establish a procedure which would facilitate an expedited final determination by the NLRB of the remanded cases. Any undue delay threatened to upset the delicate labor stability in the industry. Indeed, in his petition for

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shoremen's Ass'n Local 1242, No. 79-2022 (E.D. Pa. 1979), *petition to dissolve injunction denied*, No. 79-2022 (E.D. Pa. 1980) (10(l) injunction in Philadelphia); *Boire* v. *Int'l Longshoremen's Ass'n Local 1408*, No. 77-925 (M.D. Fla. 1977) (10(l) injunction in Jacksonville); *Humphrey* v. *Int'l Longshoremen's Ass'n*, No. Y-75-1395 (D. Md. 1976) (10(l) injunction in Baltimore); *Humphrey* v. *Int'l Longshoremen's Ass'n*, 401 F. Supp. 1401 (E.D. Va. 1975), *rev'd*, 548 F.2d 494 (4th Cir. 1977) (10(l) injunction in Hampton Roads); *Balicer* v. *Int'l Longshoremen's Ass'n*, 364 F. Supp. 205 (D. N.J.), *aff'd mem.*, 491 F.2d 748 (3d Cir. 1973) and *Balicer* v. *Int'l Longshoremen's Ass'n*, 86 L.R.R.M. 2559 (D. N.J. 1974) (10(l) injunctions in New York). However, several 10(l) petitions to enjoin enforcement of the Rules were denied. *Boire* v. *Int'l Longshoremen's Ass'n Local 1416*, No. 79-33-Civ. (S.D. Fla. 1979) (Miami); *Danielson* v. *Int'l Longshoremen's Ass'n*, No. 75 Civ. 4027 (S.D.N.Y. 1975) (New York).

[3] On October 1, 1980 the Second Circuit recalled its injunctive mandate and remanded for reexamination the seminal *Conex I* case in which the Board first invalidated the Rules on Containers. *Int'l Longshoremen's Ass'n* v. *NLRB*, No. 75-4266 (2d Cir. 1980), *recalling and remanding* 537 F.2d 706 (2d Cir. 1976), *enforcing Int'l Longshoremen's Ass'n (Consolidated Express, Inc.)*, 221 N.L.R.B. 956 (1975). The Fourth and Fifth Circuits reached the same result in other related cases. *Int'l Longshoremen's Ass'n* v. *NLRB*, No. 79-1672 (4th Cir. 1980), *remanding Int'l Longshoremen's Ass'n (Beck Arabia, Ltd.)*, 245 N.L.R.B. No. 172 (1979) and *Int'l Longshoremen's Ass'n Local 1408* v. *NLRB*, No. 79-3444 (5th Cir. 1980), *remanding Int'l Longshoremen's Ass'n Local 1408 (Puerto Rico Marine Management, Inc.)*, 245 N.L.R.B. No. 171 (1979). The Board also decided to reconsider three other related proceedings which were pending at various adjudicatory stages. *Int'l Longshoremen's Ass'n (The Terminal Corp.)*, NLRB Nos. 5-CC-925, 929; *Int'l Longshoremen's Ass'n Local 1416 (Custom Brokers & Forwarders Ass'n of Miami)*, NLRB No. 12-CE-30; and *Int'l Longshoremen's Ass'n Local 1242 (Hill Creek Farms, Inc.)*, NLRB Nos. 4-CC-1133 and 4-CE-55.

certiorari in *ILA*, the Solicitor General of the United States, on behalf of the NLRB, had recognized that "unless the uncertainty as to the validity of the Rules on Containers . . . is speedily resolved there is great danger that these negotiations will, as they have in the past, result in industrial strife over the containerization question." NLRB Pet. for Cert. at 17, *ILA, supra* (U.S. No. 79-1081, filed Jan. 10, 1980).[4]

This Proceeding

In view of the delay encountered in the pending NLRB cases,[5] petitioners on December 6, 1980 entered into an agreement providing for the implementation of the Rules on Containers effective January 1, 1981. Charges were then filed and a complaint issued initiating the NLRB unfair labor practice proceeding underlying this case.[6] This 10(l) case then ensued.

The District Court's Decisions

At the outset of this litigation, the district court denied the Regional Director's application for a temporary restraining order (App. C at 91a). District Judge Herbert J. Stern concluded that prior decisions by the Third Circuit relating to the standards to be applied in 10(l) proceedings were not applicable in this extraordinary case

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[4] The current 1980-1983 national longshore labor contract was peacefully and quickly negotiated in the wake of this Court's decision in *ILA*. However, the contract contains a provision that it can be reopened after December 1, 1981.

[5] It was not until the application for a temporary restraining order was denied in this case that the NLRB finally consolidated all the pending cases and assigned them to a single administrative law judge.

[6] Since the complaint is virtually identical to those in pending cases challenging the same Rules on Containers, the NLRB, upon petitioners' motion, ordered the complaint transferred directly to it for adjudication, and then consolidated it with the pending cases.

(App. C at 88a). In his view, the equities did not warrant the issuance of a restraining order.

The district judge indicated that he was also inclined to deny the requested 10(l) injunction (App. C at 92a). He urged the parties to agree to convert the unappealable denial of the temporary restraining order into an order denying the 10(l) injunction to facilitate an immediate appeal (App. C at 93a, 98a, 102a). When this did not materialize, the court decided to render a formal adjudication on the 10(l) application.

Ten days before the hearing, the Third Circuit rendered a decision in a related labor/antitrust case involving the Rules on Containers. *Consolidated Express, Inc.* v. *New York Shipping Association ("Conex II")*, 641 F.2d 90 (3d Cir. 1981), *mandamus and prohibition denied sub nom. In re International Longshoremen's Association*, 49 U.S. L.W. 3789 (U.S. Apr. 20, 1981) (No. 80-1414). In the course of its opinion, the court of appeals took note of the §10(l) proceeding in this case. 641 F.2d at 94. It went out of its way to state its views on §10(l), although that was not an issue in the case before it.

> [W]e have interpreted section 10(l) as ancillary to the main unfair labor practice proceeding and have confined the district court in a section 10(l) to determining that the General Counsel has reasonable cause to believe that the elements of an unfair labor practice are present and that the legal theory on which he proceeds is substantial and not frivolous.

Id. at 95.

On February 23, 1981, the district court ruled reluctantly that it was compelled to issue the 10(l) injunction in this case. Referring to the Third Circuit's *dictum* in *Conex II*, the district court said:

> As I read it, a clue has been given to us as to what to do with this 10(l) application. I might say that after that opinion came down a lot of our thinking had to be rethunk and our writing had to be rewrote. And I have a very elaborate thing to say here. But before I say it, I think maybe I ought to give counsel an opportunity to address that opinion, because it seems to me the Circuit is saying that I should grant a 10(l) in this case.

(App. C at 157a-158a).

Although the district court expressly disagreed with what it believed to be the rule in the Third Circuit, it nonetheless considered itself bound by the rule that it must automatically issue a 10(l) injunction if it finds that the Regional Director's theory is not "frivolous and insubstantial," even though an independent determination of the equities would establish that the injunction was not "just and proper" (App. C at 183a-189a). The district court granted the injunction without considering the equities (App. C at 188a-190a).

The Decision of the Court of Appeals

The court of appeals affirmed. The appellate panel which decided the case upheld the district court's exercise of 10(l) jurisdiction despite the previous adjudication on the merits and remand to the Board by both this Court and the District of Columbia Circuit in *ILA*. The panel also reaffirmed the Third Circuit's rule that a 10(l) injunction is warranted if "the Board's legal theory is substantial and not frivolous" (App. A at 7a).

In rather oblique fashion, the court of appeals panel confirmed the district court's perception that the rule prevailing in the Third Circuit prohibited any consideration of the equities under the "just and proper" standard of

NLRA §10(l). However, the panel paid lip service to the "just and proper" test. It suggested that the injunction in this case served to preserve the status quo which it defined as the period 1973 through 1980, when "the Rules on Containers were inoperative" (App. A at 7a). Its definition, however, was at odds with the district court's finding that this putative "status quo" was artificially created by court decrees enjoining implementation of the Rules (App. C at 35a, 88a, 95a, 190a). Those prior injunctions were premised on what this Court in *ILA* ultimately held to be an erroneous legal theory.[7]

Reasons for Granting the Writ

A. *Conflict in the Circuits*

NLRA §10(l) prescribes two standards which must be met before a preliminary injunction may be granted:

> (1) The petitioner must have "reasonable cause to believe" that the unfair labor practice charge is true; and
>
> (2) The district court may grant such injunctive relief "as it deems just and proper."

29 U.S.C. §160(l).

The 10(l) test formulated by the Third Circuit requires the district court to find "reasonable cause" whenever the Regional Director's legal theory is not "frivolous and insubstantial," even if the district court concludes that the theory is erroneous. In the Third Circuit's view, the is-

[7] The Third Circuit panel also gratuitously assumed that implementation of the Rules would drive consolidators out of business (App. A at 6a, 8a). The district court, however, had prescinded from any consideration of the equities and thus had declined to make any findings with respect to this disputed factual allegation (App. C at 188a-190a).

suance of a 10(l) injunction is automatically "just and proper" if its version of "reasonable cause" exists. The Third Circuit's decision in this case is in direct and irreconcilable conflict with the decisions of other circuits with respect to both aspects of the statute.

A fourway split in the circuits has developed. The Fifth, Seventh, Eighth and Ninth Circuits have endorsed the "frivolous and insubstantial" test although the Fifth Circuit may have recently signalled its departure from the test. While the First Circuit has adopted only the "insubstantial prong" of the test, the Second and Fourth Circuits have rejected the test entirely. The Sixth and Tenth Circuits, on the other hand, have not formulated any test, preferring instead the literal language of the statute. None of the other circuits, however, has embraced the Third Circuit's interpretation of the "just and proper" standard.

1. Reasonable Cause

The Second and Fourth Circuits have expressly ruled that a district court should not grant the requested 10(l) injunction if it is convinced that the Regional Director's legal theory—albeit not "frivolous or insubstantial"—is nonetheless wrong as a matter of law. *Danielson* v. *Joint Board of Coat, Suit & Allied Garment Workers,* 494 F.2d 1230, 1239-45 (2d Cir. 1974); *Humphrey* v. *International Longshoremen's Association,* 548 F.2d 494, 497-98 (4th Cir. 1977); *see also Kaynard* v. *Palby Lingerie, Inc.,* 625 F.2d 1047, 1051 (2d Cir. 1980) (analogous NLRA §10(j) proceeding). These two ciricuits have concluded that application of the "frivolous and insubstantial" standard would amount to an improper abdication of judicial function tantamount to converting the district court into a "rubber stamp." *Danielson,* 494 F.2d at 1239, 1243-44. In the view of the Second and Fourth Circuits, the Regional

Director must, at the very least, establish a reasonable likelihood that his theory will be approved by the Board and ultimately enforced by a circuit court on review. *Humphrey*, 548 F.2d at 498.[8]

In a series of decisions culminating with the one for which review is now sought, the Third Circuit formulated the rule that a district court must passively defer to the Regional Director's legal theory as long as it is not "frivolous and insubstantial". *Conex II, supra; Hirsch* v. *Building & Construction Trades Council*, 530 F.2d 298 (3d Cir. 1976); *Samoff* v. *Building & Construction Trades Council*, 475 F.2d 203 (3d Cir.), *vacated and remanded as moot*, 414 U.S. 808 (1973); *Schauffler* v. *Local 1291, International Longshoremen's Association*, 292 F.2d 182 (3d Cir. 1961). Other circuits have followed suit. *See, e.g., Boire* v. *International Brotherhood of Teamsters*, 479 F.2d 778, 789 (5th Cir. 1973); *Squillacote* v. *Graphic Arts International Union*, 540 F.2d 853 (7th Cir. 1976); *Hendrix* v. *Operating Engineers Local 571*, 592 F.2d 437, 442 (8th Cir. 1979); *Kennedy* v. *Los Angeles Typographical Union*, 418 F.2d 6, 8 (9th Cir. 1969).[9] The First Circuit has adopted only the "insubstantial" prong of the "frivolous and insubstan-

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[8] The Fourth Circuit's rejection of the "frivolous and insubstantial" standard in *Humphrey* occurred in a related §10(l) case involving the same labor law challenge to the same Rules on Containers at issue in this case. *Humphrey* may have heralded a trend in the circuits favoring departure from this standard. In *Baldovin* v. *Int'l Longshoremen's Ass'n*, 626 F.2d 445, 454 (5th Cir. 1980), the Fifth Circuit, which had previously endorsed the "frivolous and insubstantial" standard, refused to issue a 10(l) injunction based upon a legal theory it found to be erroneous.

[9] Neither the District of Columbia Circuit nor the Sixth or Tenth Circuit has become embroiled in this conflict. The District of Columbia Circuit has never decided a §10(l) case; the latter two circuits have merely applied the literal language of the statute without elaboration. *See, e.g., Angle* v. *Sacks*, 382 F.2d 655 (10th Cir. 1967); *AFTRA* v. *Getreu*, 258 F.2d 698 (6th Cir. 1958).

tial" standard. *Union De Tronquistas Local 901* v. *Arlook*, 586 F.2d 872 (1st Cir. 1978) (Regional Director's legal theory must be accepted if "not without substance").

Thus there exists a four-way split among the circuits as to the standard to be applied to a Regional Director's legal theory under NLRA §10(l)—a divergence that can be reconciled only by this Court.

2. Just and Proper

All the circuits agree that, in addition to the reasonable cause standard, the "just and proper" language of §10(l) establishes a separate and distinct test that must be independently satisfied before injunctive relief may issue.[10]

The words "just and proper" represent a congressional embodiment of the traditional considerations that a court takes into account in entertaining an application for equitable relief. These considerations include: (1) a showing of irreparable injury pendente lite, (2) a balancing of the equities or comparative harm among interested persons, (3) the maintenance of the status quo, and (4) the protection of the public interest. *Sampson* v. *Murray*, 415 U.S. 61, 84-92 (1974); *Brown* v. *Chote*, 411 U.S. 452, 456 (1973). The other traditional equitable factor, likelihood of ultimate success on the merits, is of course subsumed in the "reasonable cause" standard of §10(l).

These traditional equitable principles, universally invoked by federal courts in preliminary injunction applications under Fed. R. Civ. P. 65, have been applied by those circuits which have specifically addressed the question

[10] *Union De Tronquistas*, 586 F.2d at 876, 877-78; *Kaynard* v. *Local 282, Teamsters*, 576 F.2d 471, 477 (2d Cir. 1978); *Danielson*, 494 F.2d at 1242; *Boire*, 479 F.2d at 787; *Hendrix*, 592 F.2d at 443; *Kennedy*, 418 F.2d at 8.

whether a §10(l) injunction is just and proper. *Danielson* v. *IBEW Local 501*, 509 F.2d 1371, 1375 (2d Cir. 1975) (delay); *Boire*, 479 F.2d at 788-89 (status quo, irreparable harm, balancing of equities, public interest); *Squillacote*, 540 F.2d at 859 (balancing of equities); *Hendrix*, 592 F.2d at 443 (usual discretionary equitable considerations).[11] It had seemed that the Third Circuit in *Schauffler* had previously agreed with its sister circuits.

> It was only necessary to determine whether the Director had reasonable cause to believe that the charges filed were true. The court must, of course, *also* find, as it did find, that its granting of equitable relief was 'just and proper.'

292 F.2d at 186, n.4 (emphasis supplied).

In its latest decisions, however, the Third Circuit has departed from the prevailing rule. It has directed its district courts to disregard equitable considerations in the §10(l) setting.[12] In this case, it has in effect ruled that if the district court finds "reasonable cause," the issuance of the injunction is automatically "just and proper." In the Third Circuit's view, once there has been a minimal factual showing and the district court has determined that it cannot say that the Regional Director's legal theory is

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[11] In an earlier 10(l) proceeding involving the Rules on Containers, Judge Lacey of the District of New Jersey considered the equitable factors of irreparable harm, balancing of the equities and the public interest in adjudicating the propriety of injunctive relief under the "just and proper" standard. *Balicer*, *supra*, 364 F. Supp. at 227.

[12] The only circumstance where the decision below would give effect to the "just and proper" clause—"when there was no actual threat that the unfair labor practice charged before the Board was likely to continue pendente lite" (App. A at 8a)—is a meaningless exception. If the challenged conduct has ceased and there is no threat that it is likely to resume, the 10(l) application becomes moot.

frivolous or insubstantial, an injunction must issue as a matter of course. This was the scenario expressly followed by the district court in this case. This was what the Third Circuit affirmed.

There exists then wide judicial disagreement among the circuits in formulating and applying the standards of §10(l), a statute of nationwide application. Review by this Court is necessary to resolve the conflict.

B. *Constitutional Question*

The judicial power of the United States is vested in this Court and in inferior courts established by Congress. U.S. CONST., art. III, §1. That power may not be vested in, nor shared by, other branches of government. *United States* v. *Nixon*, 418 U.S. 683, 704 (1974); *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803). The NLRB is not a court established by Congress, but an administrative agency within the executive branch, which is powerless to grant judicial relief. *NLRB* v. *Riverside Mfg. Co.*, 119 F.2d 302 (5th Cir. 1941).

Adjudicative actions by administrative agencies are constitutionally permissible only if at some point they undergo review by a court of law. *Yakus* v. *United States*, 321 U.S. 414, 429, 434 (1944); *accord*, *McLean Trucking Co.* v. *OSHRC*, 503 F.2d 8, 11 (4th Cir. 1974). Absent judicial review, there is an unconstitutional delegation of the judiciary's Article III powers.[13]

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[13] This Court has also recognized that, in the granting of injunctive relief, a court retains its traditional equitable powers, even if the statute does not contain the "just and proper" language or any other expression of equitable discretion. *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329-30 (1940); *Potter* v. *Warner Holding Co.*, 328 U.S. 395, 398 (1946). Until recently it seemed that the Third Circuit agreed. *See Hodgson* v. *Carpenters Local 2212*, 457 F.2d 1364, 1368 (3d Cir. 1972).

The rule formulated by the Third Circuit in this case dilutes the power of a federal court in a §10(l) proceeding to a degree that effectively vitiates any judicial review. The district court has no fact-finding role; it must resolve all disputed issues in favor of the Regional Director. The court has no judicial role; it must accept the Regional Director's legal theory, no matter how clearly erroneous it may seem, if it is within the realm of rationality. The court has no equitable role; having found "reasonable cause," it must issue injunctive relief without inquiry into its justice or propriety.

The Third Circuit would strip from the district court and entrust—not to the NLRB but to the agency's staff—the real judicial function. As the district judge painfully recognized in this case (App. C at 33a-36a, 47a, 202a), the court is reduced to a mere functionary of the agency, foreordained to grant relief which only a court can give—an injunction backed with the sanction of contempt.

Petitioners believe that the Third Circuit's rule is repugnant to Article III of the Constitution of the United States.[14] Review by this Court, the final arbiter of the Constitution, *Pennekamp* v. *Florida*, 328 U.S. 331, 335 (1946), of the §10(l) standards formulated by the Third Circuit is needed to rectify the unconstitutional abdication of a federal court's Article III powers.

C. *Novel Jurisdictional Issue*

This case also presents for adjudication the novel and important issue of a district court's jurisdiction to entertain a 10(l) application in an NLRB case on remand from

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[14] Where this occurs in an injunction proceeding, which may well be dispositive of the entire controversy, the contravention of Article III may also give rise to an infringement of due process. *See* note 16 *infra* and accompanying text.

a court of appeals. Section 10(l), which establishes a limited exception to the jurisdictional proscriptions of the Norris-LaGuardia Act, 29 U.S.C. §101, *et seq.*, permits a federal district court to issue a preliminary injunction at the outset of certain NLRB unfair labor practice cases. Once the Board has adjudicated the charge, the district court's NLRA §10(l) jurisdiction ceases, and any relief it has granted expires. *Sears, Roebuck & Co.* v. *Carpet Layers Local 419*, 397 U.S. 655, 658-59 (1970). Thereafter judicial power to entertain the controversy falls within the *exclusive* jurisdiction of an appropriate court of appeals under NLRA §§10(e) and 10(f), 29 U.S.C. §§160(e) and 160(f). The appellate court is empowered not only to review the merits of the Board's determination, but also "to grant such temporary relief or restraining order as it deems just and proper." 29 U.S.C. §§160(e) and 160(f).

The Third Circuit facilely upheld the district court's exercise of 10(l) jurisdiction in this case over a controversy on remand to the Board after adjudications on the merits by both this Court and several circuit courts (App. A at 6a-7a). While conceding the jurisdiction of the remanding courts of appeals to grant the requested injunctive relief (App. A at 7a), the Third Circuit, despite the clear and unambiguous language of NLRA §§10(e) and 10(f), refused to accept the *exclusive* nature of this appellate jurisdiction. Instead, it found concurrent 10(l) jurisdiction in the district courts (App. A at 7a).

The Third Circuit's holding directly conflicts with the only other authority on point. *Great Western Broadcasting Corp.* v. *Hoffman*, 214 F. Supp. 173 (N.D. Cal. 1963). Moreover, the ruling of the court of appeals in this case is at odds with the Second Circuit's denial of the Board's request in *Conex I* to keep its cease and desist order in effect pending the NLRB's reconsidera-

tion of the legality of the Rules on Containers pursuant to this Court's remand in *ILA*. The Third Circuit's ruling therefore leads to the anomalous result that the Board was able to obtain from the district court under the lesser 10(l) standard the very relief which this Court and the District of Columbia Circuit in *ILA* and the Second Circuit in *Conex I* had expressly withheld on the merits.

A district court is divested of §10(l) jurisdiction when a controversy has been presented to an appellate court. Review of this novel and exceptional issue will enable this Court to define the precise contours of the jurisdictional provinces of district and circuit courts within the NLRA's statutory scheme.

D. *Recurring Issues of National Scope and Importance*

The multiple conflicts among the circuits in the interpretation of NLRA §10(l) have never been resolved by this Court despite several grants of certiorari in 10(l) cases. *See, e.g., Samoff* v. *Building and Construction Trades Council*, 475 F.2d 203 (3d Cir.), *vacated and remanded as moot*, 414 U.S. 808 (1973); *McLeod* v. *General Electric Co.*, 366 F.2d 847 (2d Cir. 1966), *vacated as moot*, 385 U.S. 533 (1967) (related §10(j) case). Justice Harlan, in granting a stay of the appellate court's judgment in *McLeod*, observed that the interpretation of the NLRA provisions authorizing preliminary injunctions "has not heretofore been passed upon by this Court and is of continuing importance in the proper administration of the Labor Act." Solicitor General's Pet. for Cert. at 12, *McLeod, supra* (U.S. No. 66-645, filed Oct. 7, 1966).

This Court's efforts to settle these important issues have been thwarted in the past. This case, however, provides an excellent opportunity for a definitive ruling by the Court. Since the underlying NLRB proceeding will not be de-

cided for several years (App. C at 170a, 175a), it is unlikely that this 10(l) case will become moot.

The significant issues in this case frequently recur. In the most recent five-year period, ending September 30, 1979, for which statistics are available, an average of almost 250 petitions for NLRA preliminary injunctions were filed annually. *See* 40-44 NLRB ANN. REPS. In this sensitive area, which reaches into every corner of the nation's economic life, "plainly the Board and the courts need to know what the correct standard is." Solicitor General's Pet. for Cert. at 12, *McLeod, supra* (U.S. No. 66-645, filed Oct. 7, 1966).[15]

The Third Circuit's rule, which effectively forecloses judicial participation for all practical purposes, deprives 10(l) respondents of their day in court on what may be the most important aspect of the labor controversy.[16] While two circuits have rejected the Third Circuit's formulation, four others have adopted a similar rule.[17] A defini-

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[15] A ruling by this Court on §10(l) would also have a material bearing on the proper interpretation of its companion §10(j), 29 U.S.C. §160(j), and provide guidelines for the application of other federal statutes which authorize temporary injunctions at the behest of an administrative agency or officer. *See* App. E at 209a-213a.

[16] This Court has recognized that a decision on a temporary injunction may be tantamount to a final disposition of the entire labor controversy.

> The truth is that authorizing the issuance of a temporary injunction, as is frequently true of temporary injunctions in labor disputes, may effectively dispose of petitioner's rights and render entirely illusory his right to review here as well as his right to a hearing before the Labor Board.

Local 438, General Laborers v. *Curry*, 371 U.S. 542, 550 (1963); *cf., Buffalo Forge Co.* v. *United Steelworkers*, 428 U.S. 397, 412 (1976).

[17] A pronouncement by this Court then would have the additional salutary effect of discouraging forum shopping by the NLRB.

tive statement by this Court, which would insure a correct and uniform interpretation of the oft-invoked NLRA §10(l), is necessary to effectuate the congressional policy favoring uniform application of national labor law. *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 242 (1959); *Garner* v. *Teamsters Local 776*, 346 U.S. 485, 490 (1953).

See generally Liquor Salesmen's Local 2 v. *NLRB*, —— F.2d ——, 106 L.R.R.M. 2953, 2956-57 (D.C. Cir. 1981); *see also Insurance Workers* v. *NLRB*, 124 U.S. App. D.C. 8, 360 F.2d 823 (1966). In this case, a §10(l) proceeding to enjoin implementation of the Rules on Containers could have been brought in any jurisdiction on the East and Gulf Coasts. The Board selected the Third Circuit to take advantage of its more lenient standard.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: New York, New York
June 9, 1981

Respectfully submitted,

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80-2095

APPENDIX

Office-Supreme Court, U.S.
FILED
JUN 10 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

No. .....

NEW YORK SHIPPING ASSOCIATION, INC., COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, ATLANTIC COAST DISTRICT, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,

Petitioners,

v.

WILLIAM A. PASCARELL, Acting Regional Director of the Twenty-Second Region of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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APPENDIX A

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
No. 81-1308

WILLIAM A. PASCARELL, Acting Regional Director of the Twenty-Second Region of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD,

v.

NEW YORK SHIPPING ASSOCIATION, INC., COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, ATLANTIC COAST DISTRICT, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,

and

WEST GULF MARITIME ASSOCIATION, SOUTHEAST FLORIDA EMPLOYERS' ASSOCIATION, MOBILE STEAMSHIP ASSOCIATION, INC. and the SOUTH ATLANTIC AND GULF COAST DISTRICT INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,

New York Shipping Association, Inc., Council of North Atlantic Shipping Associations, International Longshoremen's Association, AFL-CIO and Atlantic Coast District, International Longshoremen's Association, AFL-CIO,

Appellants.

(D.C. Civ. No. 81-0013)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Appendix A—Opinion of Court of Appeals

Argued: April 22, 1981

Before:

SEITZ, *Chief Judge* and
ALDISERT and GIBBONS, *Circuit Judges.*

(Opinion Filed May 20, 1981)

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Opinion of the Court

Gibbons, *Circuit Judge*

The New York Shipping Association, Inc. (NYSA), the International Longshoremen's Association, AFL-CIO (ILA), and others, appeal from a preliminary injunction issued pursuant to Section 10(l) of the National Labor Relations Act, 29 U.S.C. § 160(l), on a petition brought by William A. Pascarell, Acting Regional Director, on behalf of the National Labor Relations Board (the Board). The injunction prohibits the defendants from implement-

ing certain provisions of a collective bargaining agreement between NYSA and ILA pending resolution of charges before the Board that those provisions, the Rules on Containers, violate Section 8(b)(4)(ii)(B) of the Labor Management Relations Act, 29 U.S.C. § 158(b)(4)(ii)(B). Prior stages of this ongoing dispute are set out in *NLRB* v. *International Longshoremen's Ass'n*, 447 U.S. 490 (1980); *Consolidated Express Inc.* v. *New York Shipping Ass'n, Inc.*, 641 F.2d 90 (3d Cir. 1981), *mandamus and prohibition denied*, 49 U.S.L.W. 3789 (U.S. April 20, 1981); *Consolidated Express, Inc.* v. *New York Shipping Ass'n*, 602 F.2d 494 (3d Cir. 1979), *vacated and remanded*, 48 U.S.L.W. 3849 (U.S. June 30, 1980); *Balicer* v. *International Longshoremen's Ass'n*, 364 F. Supp. 205 (D.N.J.), *aff'd mem.*, 491 F.2d 748 (3d Cir. 1973). In the *Balicer* case the Regional Director on behalf of the Board obtained a Section 10(l) injunction preventing the operation of the Rules on Containers pending resolution of unfair labor practice charges pending before the Board. Since the charges involved alleged violations of Section 8(b)(4) that application was, under Section 10(l), mandatory. Compare Section 10(j), 29 U.S.C. § 160(j). A preliminary injunction issued, and thus from 1973 to date the Rules on Containers were never operative. The Board in a number of cases held that the Rules on Containers did in fact violate Section 8(b)(4). The effect of those decisions was to prevent implementation of the Rules. On June 20, 1980, however, the Supreme Court held that in deciding the Section 8(b)(4) charges the Board had applied on incorrect legal standard, and remanded for further consideration. *N.L.R.B.* v. *International Longshoremen's Ass'n, supra.*

The status quo from 1973 through 1980 was that the Rules on Containers were inoperative. This permitted

continued operation of the businesses of certain freight consolidators who employed teamsters rather than longshoremen. Late in 1980, NYSA and ILA agreed to institute implementation of the Rules beginning January 2, 1981. Meanwhile, pursuant to the Supreme Court's mandate, the Board conducted an investigation of the Section 8(b)(4) charges in light of the Court's opinion, and concluded that complaints should be processed. That conclusion triggered the mandatory Section 10(l) duty to petition for injunctive relief pending the Board's final adjudication. By the time the district court considered that petition it was clear that the defendants intended to implement the Rules. Such implementation would drastically alter the status which prevailed from 1973 through 1980, by depriving the freight consolidators and their employees of business they had enjoyed for years. The district court issued a Section 10(l) injunction prohibiting implementation of the Rules pending the Board's decision on the pending charges. This appeal followed. Several objections to the district court order are advanced, none of which are meritorious.

First NYSA and ILA contend that the district court should not have entertained a Section 10(l) application, but should have referred the Board to the Court of Appeals from which the pending unfair labor practice cases were remanded for consideration of pendente lite relief. We reject that contention because it is plainly inconsistent with the structure of the Act. Authority of Courts of Appeals to enforce the prohibitions against unfair labor practices depends on 28 U.S.C. §2112 and Section 10(e) of the Act, 29 U.S.C. §160. Those statutes provide for enforcement of Board orders. Section 10(e) authorizes

appropriate temporary relief, but only in connection with enforcement of a Board order. The Board's unfair labor practice orders have been vacated. The Board itself lacks authortiy to order pendente lite relief, but must apply for such relief to a district court pursuant to Section 10(j) or (l). Undoubtedly the Congressional decision to direct the Board to the district courts for temporary relief reflects the reality that such relief will require the creation of some kind of factual record in advance of the creation of the Board's adjudicative record. The creation of such a record is a task for which an appellate court is unsuited. We do not hold that a court of appeals reviewing a Board decision pursuant to Section 10(e) lacks the power to enforce a Board order pending a remand. *See* 28 U.S.C. § 1651. We hold only that if there is such power it in no way preempts the district court's section 10(l) authority or the Board's Section 10(j) discretion and Section 10(l) duty.

Next, NYSA and ILA contend that the district court erred in issuing a preliminary injunction upon a finding that there is reasonable cause to believe an unfair labor practice is present and the Board's legal theory is substantial and not frivolous. In applying that standard the district court applied the settled law of this circuit. *Consolidated Express Inc.* v. *New York Shipping Ass'n Inc.*, 641 F.2d 90 (3d Cir. 1981), *mandamus and prohibition denied*, 49 U.S.L.W. 3789 (U.S. April 20, 1981); *Hirsch* v. *Building & Construction Trades Council of Philadelphia & Vicinity*, 530 F.2d 298 (3d Cir. 1976); *Samoff* v. *Building & Construction Trades Council of Philadelphia & Vicinity*, 475 F.2d 203 (3d Cir.), *vacated for mootness*, 414 U.S. 808 (1973); *Schauffler* v. *Local 1291, International*

Longshoremen's Ass'n, 292 F.2d 182 (3d Cir. 1961). This panel is not free to disregard those cases. Moreover, for the reasons set forth therein we are convinced the rule they announce is sound.

Finally, NYSA and ILA contend that even assuming the *Hirsh-Samoff-Schauffler* test for determining whether pendente lite relief is appropriate the district court must under Section 10(l) determine what injunctive relief is "just and proper." Obviously the language of the statute would permit the district court to decline an injunction when there was no actual threat that the unfair labor practice charged before the Board was likely to continue pendente lite. That is not our situation, however, for NYSA and ILA agreed in late 1980 to change the status quo effective Jnuary 2, 1981, by putting into effect Rules on Containers which up to then had not been in operation. Those Rules involve non-frivolous substantial unfair labor practice charges. Given the fact that the Board's obligation to seek pendente lite relief against Section 8(b)(4) violations is mandatory, we cannot hold that the trial court erred in refusing to permit a change in the status quo by authorizing operation of the Rules, and putting the freight consolidators out of business, while the Board hearing went forward.

The judgment appealed from will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

Judgment of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 81-1308

PASCARELL, WILLIAM A., Acting Regional Director of the Twenty-second Region of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD,

VS.

NEW YORK SHIPPING ASSOCIATION, INC., COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, ATLANTIC COAST DISTRICT, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO and WEST GULF MARITIME ASSOCIATION, SOUTHEAST FLORIDA EMPLOYERS ASSOCIATION, MOBILE STEAMSHIP ASSOCIATION, INC., AND THE SOUTH ATLANTIC AND GULF DISTRICT INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,

New York Shipping Association, Inc., Council of North Atlantic Shipping Associations, International Longshoremen's Association, AFL-CIO and Atlantic Coast District International Longshoremen's Association, AFL-CIO,

Appellants.

(D.C. Civil No. 81-0013)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Appendix B—Judgment of Court of Appeals

Present:

SEITZ, *Chief Judge* and
ALDISERT and GIBBONS, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel on April 22, 1981.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court, filed February 24, 1981, be, and the same is hereby affirmed. Costs taxed against appellants.

ATTEST:

SALLY MEVOS
Clerk

May 20, 1981

APPENDIX C

Transcript of District Court Proceedings

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

Civil No. 81-13

Transcript of Proceedings

WILLIAM A. PASCARELL, *et al.*,

Petitioner,

vs.

NEW YORK SHIPPING ASSOCIATION, *et al.*,

Respondents,

and

WEST GULF MARITIME ASSOCIATION, *et al.*,

Parties to the Contract.

APPLICATION FOR TEMPORARY RESTRAINING ORDER

Newark, New Jersey
January 5, 1981

Before:

THE HONORABLE HERBERT J. STERN, *U.S.D.J.*

APPEARANCES:

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and
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By: J. ALAN LIPS, ESQ.,
For American Trucking Associations, Inc.

[2] The Court: Who speaks for the NLRB?

Mr. Fitzsimmons: I do, your Honor. Michael Fitzsimmons and Bernard Suskewicz for the National Labor Relations Board.

The Court: With all respect, gentlemen, were it not that I have some familiarity with the case, I would have considerable difficulty in understanding exactly what you want and why.

Mr. Fitzsimmons: Can I use the lectern, your Honor?

The Court: Please do.

Mr. Fitzsimmons: As your Honor is aware, the Board comes before your Honor today with a request for a Tem-

porary Restraining Order and the issuance of an Order to Show Cause.

It is the Board's position that, given the standard for judicial review of 10(l) petitions in this Circuit, that it is quite likely that the Board would succeed on the merits of its case.

It is also the Board's position that, given the threat of irreparable injury to the charging parties in this matter, that a Temporary Restraining Order is warranted.

The Court: What do you seek to restrain?

Mr. Fitzsimmons: The Board seeks to restrain, your Honor, the enforcement of the agreement which, as your Honor is aware, describes the rules on containers between the [3] three respondents, the ILA, North At—the Council of North Atlantic Shipping Associations, NASA, and the New York Shipping Association.

The Court: I'm sorry.

Mr. Fitzsimmons: It also seeks to restrain any threats by the ILA to encourage or to restrain and coerce any of the shipping organizations to enter into or enforce that agreement.

The Court: There is no strike now?

Mr. Fitzsimmons: To my knowledge, there is no strike, your Honor. But, to my knowledge, the container—the shipping associations are declining to turn over containers to the charging parties or members of the charging party association. If the members of these associations—

The Court: Say that again. I'm very sorry. To whom?

Mr. Fitzsimmons: The shipping associations are declining to release containers to the charging parties in this matter.

The Court: Declining to release containers? What do you mean by that? I thought that the charging parties were the people that shipped them to the ships?

Mr. Fitzsimmons: That's correct, your Honor. But they do not own or—they do not own the container. The container comes from a shipping company, one of the [4] Respondents.

The Court: In other words, they won't do business with them?

Mr. Fitzsimmons: That's correct.

The Court: Can I force them to do business with them?

Mr. Fitzsimmons: You cannot force them to do business with them, your Honor, but you can enjoin them from ceasing doing business with them where the object is unlawful. Namely, that they are ceasing doing business with them because of an unlawful intent—of an unlawful reason. If the Shipping Association—

The Court: I'm a new man in all this stuff, but about twenty years ago, when I took labor law, old Bernie Meltzer, I wasn't aware that Courts generally regulated employers doing business with other employers.

Mr. Fitzsimmons: That's correct, your Honor. Normally, they do not. But, under Section B, they may.

The Court: I can force them to do business with you?

Mr. Fitzsimmons: You may not. But you may force them from doing business for an unlawful reason. If they wish to cease doing business for a lawful reason, that is not within the Board's jurisdiction or the Court's. It may be under the normal—

[5] The Court: Would they be liable for damages if they refused for an unlawful purpose?

Mr. Fitzsimmons: Would they?

The Court: Yes. That's what I asked you.

Mr. Fitzsimmons: I'm not sure Section 8 is covered by Section 303 of the Taft-Hartley Act. Under Section 8(4)B

the Union would be liable. The Union is liable for an unlawful secondary boycott.

The Court: But there is none?

Mr. Fitzsimmons: Yes, there is, your Honor. It's the Board's allegation—

The Court: There is picketing?

Mr. Fitzsimmons: No, your Honor. The agreement, itself, carries with it the threat of a fine if the container is turned over or—

The Court: If the agreement is unlawful, it cannot be enforced?

Mr. Fitzsimmons: That's correct. But the threat is still there.

The Court: I'm not so sure it's a justiciable controversy. That is one of the ways we judges have for not to decide.

Mr. Fitzsimmons: 8(4)B or 8E, your Honor.

The Court: I'm not so sure any of it is justiciable yet.

[6] In other words, you don't have a situation where the Union is picketing or striking—

Mr. Fitzsimmons: That's correct, your Honor. Not to my knowledge.

The Court: —or refusing to provide a service or do something that the law requires them to provide?

Mr. Fitzsimmons: They may be refusing to provide a service, your Honor.

The Court: We don't know that, though?

Mr. Fitzsimmons: We don't know that.

The Court: I'm talking about what you are here in court on.

Mr. Fitzsimmons: But we are able to establish, your Honor, that the container—the Respondent employers who control the containers are doing something. They are refusing to turn over the containers or they are acting in

other ways which inhibit and will, in fact, destroy the businesses of the charging parties. An employer can violate Section 80 of the Act.

The Court: You say "turn over." You got to help me. I just don't know what you mean. You mean they won't take—you mean they won't give it to them?

Mr. Fitzsimmons: That's correct, your Honor.

[7] The Court: That's a fancy way of saying they won't let them do the stuffing, isn't it?

Mr. Fitzsimmons: That's correct.

The Court: You know, I must say, if I didn't have a couple of years background in this, I would never be able to understand this case from papers. I'm sure it's not your fault. It's a very complicated business.

Mr. Fitzsimmons: For that reason, I'm perhaps fortunate that it went to your Honor because of your background in the matter.

The Court: I hope you feel like that at the end of it. I tell you—

Mr. Fitzsimmons: Is your Honor—

The Court: Probably the hardest case I ever dealt with, or one of the hardest. The equitities are so, you know, confused.

Mr. Fitzsimmons: I think in his prior decision, I think everyone from the Board to the Supreme Court has noted the difficulty involved in this matter. It is the Board's position that that even more so, your Honor, it should be a matter for the Board to determine. The statutory intent of Congress was that these matters remain in status quo until the Board determines them.

That may be unfair to the respondents, but that is the posture that Congress has—that's the scheme [8] that Congress has determined.

The Court: I understand that. I understand the heavy duties and weighty responsibilities that the Board has in the area of labor peace and the relationships of employers and employees.

It seems to me here the Board may well be a little beyond its usual—it may well be completely within your province to decide what is an unfair labor practice. I'm not so sure it is within your province to decide what is an antitrust violation.

Mr. Fitzsimmons: We are not. The Board doesn't intend to, your Honor, nor is it attempting to.

The Court: Nor is it within your province to compel absent picketing or boycotting by a union—I'm not so sure it is in your province to tell the employer that it must deal with another employer.

Mr. Fitzsimmons: We are not—I think it is more than a semantic difference, your Honor. We are not telling them they have to do business with them. We are telling them they cannot cease doing business with them for an unlawful purpose.

As I understand, it is not a semantic difference. It is a very large difference in fact and in law. Where they are required as a matter of law to do business is a matter not for the Board but perhaps for other [9] statutes. But the Board does have the authority to tell the employer he cannot cease doing business for an unlawful reason. Employers are within the scope of Section 8(b) of the Act.

The Court: I mean, these issues usually arise, don't they,—I may be wrong—this thing came to me about an hour and a half ago, I guess. I haven't thought about this case that fully in a couple of years. But usually these issues arise in a secondary boycott situation, don't they?

Mr. Fitzsimmons: Normally they do, your Honor. However—

The Court: That is where there is a dispute between an employer and a union and the union is trying to put muscle on the employer involved in that dispute by forcing a different employer not to do business with the other employer. Isn't that right?

Mr. Fitzsimmons: That's correct, your Honor.

The Court: Those are the kind of cases you've been referring to, haven't you?

Mr. Fitzsimmons: No, your Honor.

The Court: Wrong?

Mr. Fitzsimmons: That's probably the larger number of cases. But there are also cases, as this one, where the employer accedes to the unlawful demands of the [10] union that it cease doing business.

For instance, if the ILA went to the employers involved, the shipping associations involved, and said to them, "You must cease doing business with the container stuffers, and if you don't do that, then we will strike you," that would be a classic secondary boycott.

What has happened in this case is they have said you must sign an agreement with us that requires you, in effect, to cease doing business with the container stuffers. The shipping associations have acceded to that. That brings them within the scope of Section 8(b) of the Act. Section 8(b) of the Act was specifically designed for that purpose.

In the Supreme Court case—I don't have the cite with me, but it is called Sandor, the Supreme Court held that at that point in time it was not unlawful for parties to do just that. Although a secondary boycott had been authorized as unlawful or been determined by Congress to be unlawful, unions got around that by simply having the employers agree with them that they would cease doing business. Those agreements were not subject to the Act.

Modifications to the Act, Section 8(e), those agreements were included. That's the very situation we have here.

[11] The Court: Refresh my memory. I hope I'm not asking a double question, although I may be. Didn't we get into this whole problem because the Board originally found this to be an unfair labor practice?

Mr. Fitzsimmons: I don't understand what your Honor means by "the whole problem."

The Court: All these lawsuits?

Mr. Fitzsimmons: I think the original action was an antitrust. I think—yes, the Board clearly did at one point find them to be unlawful. That is perhaps what generated the suit that was in front of your Honor.

The Court: Is that finding today res judicata or has it been wiped out, given what the Supreme Court has done?

Mr. Fitzsimmons: It is my understanding, your Honor, that that finding has been eliminated by the Supreme Court remand.

The Court: Then I don't have to follow it any more, do I?

Mr. Fitzsimmons: No, your Honor.

The Court: Fine. Because I thought it was wrong. See, I think that the whole problem here is this is not the business of the Board to begin with. Here you got a union bargaining with an employer about wages, hours and conditions of employment, which I was taught to believe [12] was the classical business of the employer-employee bargaining.

What they are bargaining about is just security I don't like it. You don't like it. Most people don't like it. There it is. Unions have the right, I take it, to say, "Well, we want X number of people working on the job." They do it all the time on construction jobs, for example. I was

born and raised under the spectre of firemen on electric trains. You remember those days?

Mr. Fitzsimmons: I'm not so sure, your Honor.

[13] The Court: It is part of the history of the business. As I say, this thing is just coming to me now. But the real problem is here this Union has got men. They work. They work on those docks. What they have tried to do is to bargain over who gets to load the containers to be used.

Now, if that is wages, hours and conditions of employment—in other words, if the Board's original determination was incorrect in that regard, there is an end of it, isn't it?

Mr. Fitzsimmons: Of course, the Supreme Court did not find that the Board determination—excuse me—the Court did find that the Board's determination was incorrect because it focused on the wrong area. It remanded it to the Board for another determination.

It did also—the Supreme Court, also, of course, did not pass on the theory which the Board did not pass on. Namely, that the shippers do not have a right to control the containers; that because of the various shipping regulations—

The Court: The shippers don't have to do business with somebody else who doesn't stuff them there.

Mr. Fitzsimmons: Again, your Honor, we are not requiring them that they have to do business. We are saying they cannot cease doing business for an unlawful object.

[14] The Court: Yes, but you define the unlawful object as being this object; namely, what the Union perceives to be a legitimate aim of preserving jobs.

Mr. Fitzsimmons: That's correct, your Honor.

The Court: If you are wrong in that—

Mr. Fitzsimmons: Yes, your Honor.

The Court: —then this whole ball of wax gets unraveled, doesn't it?

Mr. Fitzsimmons: No. I don't think so, your Honor.

The Court: Why not?

Mr. Fitzsimmons: Under the right of control test it could not—the Board and Court may find on the actual merits of the case that it is not work acquisition, but work preservation.

The Court: That is what you did last time. You made it work acquisition?

Mr. Fitzsimmons: Acquisition. That's correct, your Honor.

The Court: That is why you found it unlawful?

Mr. Fitzsimmons: That's correct.

The Court: What is the difference between work preservation and work acquisition?

Mr. Fitzsimmons: Short explanation?

The Court: Yes.

[15] Mr. Fitzsimmons: If the work is yours, you can preserve it. If the work is not yours, if it has never been yours—

The Court: Whose work is it right now?

Mr. Fitzsimmons: Right now it's the—I'd call them the Teamsters. They may not be all represented.

The Court: ILA right now? They got it, don't they?

Mr. Fitzsimmons: That's right.

The Court: You want to change the status quo, don't you?

Mr. Fitzsimmons: No, your Honor. The ILA wants to change the status quo.

The Court: They are not here asking for a change?

Mr. Fitzsimmons: They have already changed it. They don't need you to do anything.

The Court: According to the complaints I had before me years ago, they were all complaining the ILA achieved this years ago.

Mr. Fitzsimmons: Achieved what, your Honor?

The Court: Hedge money? That they had—you know, CONEX, Twin-Ex and the others were being gravely damaged.

Mr. Fitzsimmons: Because of the enforcement of the rule?

The Court: Yes. They achieved it when they put [16] the rules into effect.

The Court: Yes. How long ago was that?

Mr. Fitzsimmons: That was approximately seven years ago. The rules were not in effect pending the Board's ruling. It was only put into effect only recently. Your Honor mentioned it. Your Honor did not agree with the Board's finding.

That, however, is not the standard for the case before your Honor.

The Court: I see that—with due respect to the Board, because I think I was bound to accept it—I'm trying to remember back now. I think there had been a Second Circuit thing.

Mr. Fitzsimmons: That's right. It had been enforced by the Second Circuit Court of Appeals.

The Court: Judge Lacey, I think, had found—

Mr. Fitzsimmons: Judge Lacey had issued a preliminary injunction, which was affirmed by the Third Circuit Court of Appeals.

The Court: As I say, I'm being honest with you. You know, you're coming in on these emergent matters with the

papers an inch and a half thick. I'm trying to do the best I can. I think where I found myself last time, I was forced to accept as the law of the case the original determination of the Board. But you say I'm not any more?

[17] Mr. Fitzsimmons: That's correct, your Honor. However, your Honor, the standard that your Honor must apply in this Circuit Court of Appeals to the law is that the Board's theory be substantial and not frivolous.

The Court: Still my name on the injunction?

Mr. Fitzsimmons: It certainly is, your Honor. Without that, it wouldn't be an injunction.

But I think the Circuit Court of Appeals has clearly defined that the standard the Board has to reach in this area is not a difficult one. I think we've given your Honor a theory on both matters, certainly on the right of control test, that even if your Honor would not agree with it that your Honor would find it to be a substantial theory, one that is not frivolous.

The Court: How does the Norris-LaGuardia Act impact on all this?

Mr. Fitzsimmons: The Norris-LaGuardia Act, your Honor, to my understanding, does not impact on anything covered by Taft-Hartley, covered by the Board. The Norris-LaGuardia Act is for private litigants, not for the Board. Not for a matter involving the Board.

[18] The Court: The two theories that you are offering me, one—would you mind going through them again? I'm sorry.

Mr. Fitzsimmons: The two theories, your Honor, are the right of control theory and the work acquisition theory.

The Court: Work acquisition I understand. You claim that they are just trying to grab this work for themselves?

Mr. Fitzsimmons: The right of control theory is that because of the various other Federal statutes involved the Shipping Associations do not have the right to control the container. Therefore, any agreement involving it or any pressure upon them is unlawful.

The Court: It's their containers?

Mr. Fitzsimmons: It's their container, your Honor, subject to the Federal—various Federal regulations. The use of the container is subject to the various Federal regulations. Just like a truck may be your truck, but if you want to operate that truck in interstate commerce, then it is subject to a Federal regulation.

The Court: A license. That doesn't make it not your truck.

Mr. Fitzsimmons: That's true.

The Court: Doesn't deprive you of your control [19] over it, does it?

Mr. Fitzsimmons: In certain matters it may.

The Court: My God, that doctrine would mean that every time the government does the slightest bit of regulation all private enterprise ceases. Is that it?

Mr. Fitzsimmons: That is not our argument, your Honor.

The Court: Who has the right of control over those containers if the shippers don't?

Mr. Fitzsimmons: The various people who stuff them.

The Court: I don't think so. I'm sorry. I don't mean to laugh. It's their containers, and they give them to whom they please to stuff them?

Mr. Fitzsimmons: All these transactions are subject to various Federal regulations. Just as that truck operating—

The Court: You can't make them do business with somebody, can you?

Mr. Fitzsimmons: Again, your Honor, we are not attempting to.

The Court: What I got stuck in my craw is this: If I understand the facts of this general situation, you got people who own the containers who are, let's call them—I think they are called shippers; right? What they do, [20] apparently—do they own the ships, too?

Mr. Fitzsimmons: I think they do, your Honor.

The Court: Or maybe they charter them or something?

Mr. Fitzsimmons: I think they have control over the ship in that type of situation; yes. That is my understanding.

The Court: And they arrange to have the people's merchandise shipped; is that it? People go to them and say, "Here. We want you to ship our things." Is that it?

Mr. Fitzsimmons: I think they may very well also go to the people who stuff the containers.

Could I check on that fact, please?

The Court: Sure.

(There is a pause in the proceedings.)

Mr. Fitzsimmons: Your Honor, counsel for the ATA is present. He would probably—I shouldn't say "probably." He would do much better than I will in terms of explaining to your Honor the background facts involved. Could he simply present that to you?

The Court: Any objection?

Mr. Lambos: Your Honor, I think that the steamship carriers are better able to present whatever facts may be necessary with respect to their own operations, their ships, their containers, and so on. And we have here in court, your [21] Honor, Affidavits from about fourteen major

steamship carriers which explain to your Honor. These were papers submitted to the National Labor Relations Board and to the general counsel only a short while ago. They tell precisely all about containers. In that regard, Conrad Eberhardt, who is the President of one of the largest containers, says, "No one else in all the world has any dominion over these containers except my companies. We own them. We insure them. We maintain them. We repair them. We refurbish them. Our name and logo are printed on the box. Most importantly, no one gets to use our box without our permission."

The Court: That wasn't what I was asking. What I'm asking is—how do people arrange to ship things in those containers?

Mr. Lambos: They will call the steamship carrier. They will ask for a box. The steamship carrier then will make a determination as to whether the person who has asked for a box is a person who should get that box. For example, they will not give it to anyone. They will only give it to those who have actually entered into an agreement that is called an "interchange agreement" and which specifically requires that the person who finally gets that box be responsible to the steamship carrier for whatever he does and follow whatever rules are reasonably imposed by the steamship carrier with respect to that box. Within the waterfront facility, itself—and [22] this is where I think the National Labor Relations Board continues the error pointed out by the Supreme Court, because they continue to look as to what happens outside the waterfront terminal —within the waterfront terminal no one in all the world but members of the ILA have the right to work on the stuffing or stripping of that box. And we, the steamship

carriers, have determined that this is the way it is. They are our boxes and we will not give them to anybody who does not abide by our rules.

Among these rules are the rules on containers. If the person—

[23] The Court: I mean, who gets a container?

Mr. Mabos: General Motors gets a container when they want to ship their goods. DuPont gets a container when they want to ship their goods.

The Court: So, in other words, under the rules as you practice them, if General Motors wants to send goods in a container, they bring the goods down to the terminal, to the dock, and it gets stuffed there?

Mr. Lambos: No, your Honor. GM says, "Will you send to my plant in Tarrytown, New York 16 containers, because I'm sending them over U.S. Lines to Rotterdam." And we will send the containers to the GM facility in Tarrytown, which is the port area, and those containers will be stuffed by GM and brought to the pier facility.

The Court: They get stripped again?

Mr. Lambos: They don't get stripped. There is no stripping done again. The only thing the ILA says, "If anybody other than the beneficial owner of the cargo is to do the stuffing or stripping within the 50-mile area of the port, we are the ones who should do it."

The Court: In other words, if a shipping company, someone who has to employ workers—union workmen who would be in the same craft or trade acts as a broker or intermediary, then the ILA rule says it should be, if not done by the ILA, then it has to be redone by the ILA?

[24] Mr. Lambos: As the Supreme Court pointed out, the ILA had the right to say in the beginning, and I think this is on—

Mr. Gleason: Page 18.

Mr. Lambos: —if the ILA wanted to, they could have said to us initially, "You can't use containers and you can't use container ships." They said—

The Court: That would have been work preservation, right?

Mr. Lambos: There is no question. They said instead the ILA permitted the great majority of containers to pass over the piers intact, reserving the right to stuff and strip only those containers that would otherwise have been stuffed or stripped locally by anyone except the beneficial owner's employees.

So what the ILA tried to do in this great compromise that resulted from a 57-day strike—their original position, if your Honor remembers, was "We want to stuff all the containers. We said we want you to stuff none of the containers." We reached what we called this great compromise in 1968, and here we are eleven years ago getting the same type of thing from the Board and we did today.

We have compromised. We now move 80 to 85 percent of all containers without handling by the ILA. [25] But we've given the ILA this part of the work jurisdiction. And that is the only thing that we have given them, and the ILA has accepted that.

Now, because the ILA was not selfish and has taken something less than they were originally entitled to, we are in these litigating areas.

Insofar as threats are concerned, we, the steamship carriers, are here and we represent both the New York Shipping Association and its over 100 steamship carriers and CONASA in all ports from Maine to Hampton Roads. We are here to say to your Honor in open court that we have not been threatened by the ILA. What we are trying to do—

The Court: Trying to live up to your agreement.

Mr. Lambos: Live up to our agreement. That is not a secondary boycott.

The Court: I understand. It's the Board that says the agreement is unlawful.

Mr. Lambos: That's right. I think if they say it is unlawful, they ought to go to the proper forums. One of the forums is before your Honor in an antitrust situation, if that were the thing. Another forum might be some other administrative agency having jurisdiction over steamship carriers, if that's what they are complaining about, [26] because one of the things pointed out here was they think it is a violation of the shipping act.

Well, the Federal Maritime Commission is the one that has jurisdiction over that, not the National Labor Relations Board.

The Court: Now you speak for the shippers.

Mr. Caruso: Steamship carriers, yes. The employers.

The Court: Yes. Is there a representative of the union here?

Mr. Gleason: Yes, your Honor.

The Court: Do you want to say something?

Mr. Gleason: My name is Thomas W. Gleason. Yes, your Honor.

One of the problems we've had here is basically we don't even think the Court has jurisdiction over this action because the Board did fight this before the Second Circuit on a remand. And the Second Circuit on the CONEX case remanded it back to the Board.

Therefore, I think if they have any jurisdiction, it's the same case, that has been up. Citing the same rules on containers that has been in the agreement since 1968, with just minor changes. If they have any dispute, I think it would belong any place with the Second Circuit on an injunction.

[27] The Court: Well—

Mr. Gleason: Because once the injunction and once the Board made their finding, the injunction went out. Judge Lacey's injunction has been out. There is no injunction in effect now any place.

In fact, your Honor, we met, counsel for CONASA, New York Shipping and myself, met with the general counsel for the National Labor Relations Board back in July and told them what our position was. We told them that the injunctions were out. They had the Second Circuit. We were going for a remand in the Second Circuit. They had another one in the Fourth Circuit. We went for remand there.

They were all granted. We told them we intended to put the rules back in effect because we felt they were legal. Now, we have not threatened New York Shipping—CONASA or New York Shipping. No threat or anything about strikes.

What we said to them—and it has been in the agreement from the start—is that, "Hey, if we can't enforce the rules, we've got a problem here in the port." You've got 8,000 people—10,000 people in the port that are supposed to work. We are lucky if we get 5,000 people. We went from 27,000 employees down to 10,000. They are paying out $50 million a year, approximately, now, for [28] people not working.

What we are saying is, if we don't have that and the rules are out, then maybe we should negotiate a shorter work day. And that's why they come back and say, "Hey, we don't want an eight-hour day, go down to a four-hour day or rotate the people."

[29] The Court: Mr. Gleason, this is not a collective bargaining session.

Mr. Gleason: Basically, your Honor, that is our feeling. We feel—

The Court: On the state of this record am I bound by my judicial determination?

Mr. Gleason: I would just say the fact is that you have the Supreme Court decision. I think based on the fact—

The Court: That decides nothing, yet, does it?

Mr. Gleason: No. I think it shows, because on the Supreme Court decision what happened was that if you remember in the CONEX there was a finding by the administrative law judge that the rules were valid.

The Board then said, "Well, they made a legal determination that was incorrect," and that has been tossed out by the Supreme Court, but the facts were adopted by the Board that the rules were valid. They adopted all the facts, therefore, Judge Ortman's decision is still in effect and it is before the Board now.

The second thing is, your Honor, as far as them bringing freight down to the pier, there is no problem.

The Court: Wait, please. Let's first confine [30] ourselves, if we can, to what the state of the law is—I don't mean the law in general, I mean the law of this case is right now.

Mr. Gleason: Our feeling is, one, we don't think you have jurisdiction.

The Court: I don't mean that, yet, Mr. Gleason. I mean are there any judicial determination which this Court must give deference to?

Mr. Gleason: Your Honor, I know of none.

The Court: That's the first thing I want to know.

Mr. Gleason: The only case—the only case that is in existence that I know of is the Hill Creek Farm case which there is an injunction down in Philadelphia.

The Court: That is Judge—

Mr. Gleason: Judge McGlynn.

The Court: Judge McGlynn's injunction?

Mr. Gleason: Yes. In that particular case Judge McGlynn at that time asked was there any outstanding cases, and the answer was yes. There were cases outstanding with CONEX in the Second Circuit.

The Court: Oh, that hadn't been vacated yet?

Mr. Gleason: That's right, your Honor. And the cases in the Fourth Circuit was not vacated at that [31] time. Beck-Arabia. Beck-Arabia was just remanded, I would say, about ten days ago and CONEX was remanded I think in October. So there are no cases.

The Court: I'm sorry?

Mr. Gleason: There are no cases that I know of that are outstanding.

The Court: Were those cases remanded—normally we would have those researched. No time. Were those cases remanded in light of the Supreme Court's decision? Is that what happened?

Mr. Gleason: Yes, your Honor.

The Court: For reconsideration?

Mr. Gleason: They were sent back to the Board.

The Court: For—is the Board then to consider anew the issue of whether or not the union's demand for these work rules is an unfair labor practice?

Mr. Gleason: Yes, your Honor. The Board, itself, not the general council of the Board, itself.

The Court: Has to reconsider that?

Mr. Gleason: Has to reconsider what they are going to do with the case. They can find—

The Court: Just a minute.

Is that right?

Mr. Fitzsimmons: Yes, that's correct, your [32] Honor.

The Court: There is no present Board decision holding that these practices are an unfair labor practice. You agree with that?

Mr. Fitzsimmons: That's correct, your Honor.

The Court: Does that mean that legally I am free to make my own determination?

Mr. Fitzsimmons: No, your Honor.

The Court: What binds me? Your view?

Mr. Fitzsimmons: The standard in this circuit is that the general counsel—that you are bound to issue the injunction if the general counsel presents you a legal theory that is substantial and not frivolous. That does not necessarily mean that there must be a Board decision that the general counsel relies upon.

The Court: You mean the general counsel can make his own determination, even though the Board has in effect been reversed by the Supreme Court of the United States?

Mr. Fitzsimmons: That's correct, your Honor. The general counsel's decision obviously not based on logic that the Board was—

The Court: This is not the first time I've run into that precedent, and I'm not sure that the Third Circuit means it to be carried quite as far as the Board [33] through counsel, because I think district courts are more than rubber stamps.

Mr. Fitzsimmons: We agree, your Honor.

The Court: For boards, much less for counsels for boards. And under your view all you got to do is come in with a plausible theory and I got to sign my name to an injunction?

Mr. Fitzsimmons: That's exactly the standard the circuit set out, your Honor.

The Court: I'm glad you said that so candidly. Because when they review this case, as they surely will somewhere, they'll hear that.

Mr. Fitzsimmons: If we have a theory that is substantial and not frivolous, then your Honor is bound by that legal theory. It is not for the district courts or the circuit courts of appeal to make the original determination in these matters. It is for the Board.

The Court: Whatever merit there may be to that view, assuming that's the circuit's view, for I, myself, you know, there is language that creeps into every opinion. I am not sure they would take it as far as—not only as far as you say it, but the way you say it.

But assuming even you are right to that degree, there is surely a difference between a decision where the pickets are flying and work is being interrupted, [34] strike situation, where the effort is to restore the status quo, and this situation where—here I'm back to my stumbling on the threshold—what you really want to do here is to change the way the work is being done.

Mr. Fitzsimmons: First of all, your Honor, Section 8(e) is equally subject to Section 10(h) as Section 8(b)(4)(B). The fact that it may only be an agreement and not the physical act of picketing is not a relative—with all respect, there is not a relevant distinction for the purposes of Section 10(h). Congress has determined agreements under Section 8(e) are equally—have an equally bad effect on the free flow of commerce as do picketing.

Second, we are not attempting to change. We are the ones who are attempting to return to the status quo. The status quo being the situation—

[35] The Court: When was this status quo?

Mr. Fitzsimmons: The status quo was the situation prior to the implementation of the Rules on Containers.

The Court: What year was that?

Mr. Fitzsimmons: 19—the reimplementation of the original implementation?

The Court: To what year do you wish us to return?

Mr. Fitzsimmons: My understanding, I wish you to return to approximately December 30, 1980. Because that is—

The Court: That was by court decree. To what status quo, to what natural status quo do you wish us to return, what year?

Mr. Fitzsimmons: The date before the—

The Court: What year was that?

Mr. Fitzsimmons: I think it was 1973, your Honor. I'm not sure.

Mr. Lambos: 1968, 1969, your Honor.

The Court: So that the status quo that you are fighting to preserve and protect here was a status quo that existed 11 years ago or 12 years ago.

Mr. Fitzsimmons: That eliminates—you're not considering for a period of time for approximately [36] seven years the rules were never enforced pursuant to Court order. Not like we are taking a decision and attempting to reverse 15 years of history. Those 15 years of history don't really exist because they were under a court order and the rules were never enforced.

The Court: Well—

Mr. Fitzsimmons: One other point I would like to make with your Honor is that on both of these theories the Supreme Court remanded them to the Board for the Board's reconsideration. The Court didn't reject them out of hand.

It had the ability to do so. It described the right of control test,—excuse me for a minute—petitions have also argued that the employers as common carriers who were subject to government regulation and to the provision of their own tariffs, shippers' bills of lading, intermodal agreements with motor carriers have no legal right to withhold containers or are on a selective basis to condition access to the containers on compliance with these rules, to seek indemnification from their customers for fines imposed by the rules or to enforce the rules after the containers have been released to the motor carriers.

There then follows several cites. Then the Court says these contentions present difficult and complex problems which are not properly before us.

[37] I think that is absolutely correct, your Honor. To some extent that's a binding finding upon this Court, that these are complex matters.

The Court: They are too complex for us.

Mr. Fitzsimmons: Pardon me?

The Court: Too complex for us.

Mr. Fitzsimmons: That's correct. Correct in the sense that they should be first interpreted by the Board.

The Court: If they are first interpreted by the Board, then you will tell us we have no business because of your expertise in getting involved.

Well, all right. Look, I don't know if you got standing.

Mr. Lips: Your Honor, I believe as the charging party we do.

The Court: Here?

Mr. Lips: In federal District Court. It is my understanding of the law that the charging party does have standing. The general counsel has invited us to make some presentation. I think that the gentlemen representing the

Board today are seriously handicapped because they are new to this very complex case. They don't have the background, history and facts which we possess and which we'd like to present to the Court to assist your Honor.

[38] There are many material facts that have not been clearly represented here today. There is great injury going on today. I think the Court has gotten a misconception about what has gone on.

There is a boycott going on today. There are people all up and down the coast being injured today. They are being refused the opportunity to pick up containers that are consigned to them from export across seas, import into this country. They've gone down to get the containers, they won't be released. They are filled with cargo. They belong to customers that we represent. Because the ILA thinks they are going to unload them within 50 miles, so they won't release the containers.

Furthermore, new containers—empty containers have been refused to shippers. These are not the ship owners. They are not the vessel operators that are the respondents in these cases. These are people who have contracts to ship for manufacturers who actually issue the bills of lading and are responsible for the total movement across the land, sea, and the land on the other side.

They are entitled to have empty containers to service their customers, because under the shipping acts and the whole context of common carriers the common carrier is required to provide his service non-discriminatorily to anyone who wants to ship.

[39] Now, that means that the facts that the vessel operators own the containers has nothing to do with it. They've always owned the ships. Nevertheless, the law says they have to provide non-discriminatory service. So, whether it is a removable container or vessel—

The Court: Can they—does the union have a right to object if the owner of a ship prohibits people who it charters to ship to from bringing in their own hands to act as stevedores?

Mr. Lips: That's not the issue. We are not arguing over who does the work on the pier.

The Court: I just asked you that question.

Mr. Lips: No, I wouldn't say they do.

The Court: You wouldn't say—now I've lost my—what are you saying? What is your answer?

Mr. Lips: My answer is that I don't believe that the passenger has the right to bring his own deck hand in to help operate the ship when he's transporting it.

The Court: Not to operate the ship, but to load it.

Mr. Lips: To load it?

The Court: Yes. That was my question. In other words, suppose I own—

Mr. Lips: Are we talking about loading it with a container that is filled with cargo that has been [40] filled somewhere else?

The Court: No. I know my question is on target now. I'll try harder.

Mr. Lips: I'm not sure what you are asking.

The Court: Suppose I own a freighter. Being a good and non-discriminatory sort of fellow, I'll let him have it. He says, "I'll bring my own crew of men in there to load it."

I says, "No, no, I got these employees. I have a contract with them. They load my ships."

Can I prevent him from bringing in his own people under penalty of not chartering a ship to him?

Mr. Lips: If the law permits him to refuse to do business with that person under those conditions, I suppose he can.

The Court: Of course, you say if the law permits it. My question is, would the law permit it?

Mr. Lips: The law does absolutely not permit it. The Supreme Court—

[41] The Court: I disagree with you. I think that is job preservation.

Mr. Lips: Well, let me raise this prospect to you, your Honor: What is job preservation about—what is the distinction between preserving jobs 49 miles away from the pier and 51 miles away from the pier?

The Court: You know, it may well be that they could have done it 51 miles or 151 miles away, because the containers are the—we live in a modern era. These ships, many of them are made to carry containers.

Mr. Lips: No question about it.

The Court: And they are all of one piece, really. Now, it may well be in a compromise they decided to bargain and to give up some things and get some things. They decided to protect jobs within a 50-mile radius. Maybe they are willing to go that far away. It had compensating factors and less need to worry about it. Because if it was unable to obtain perfect job security, there is no reason why it should obtain none.

Mr. Lips: We don't challenge that, your Honor. The question is, where you draw the line as to what work is theirs and what work belongs to the employees of the truckers if the union gets work they claim.

The point is, no official body has yet decided the underlying merits of where that line should be drawn. [42] The Supreme Court faced both the arguments presented to you today. It looked at them carefully and decided it was not its place as the Court to determine either of the two issues.

The Court: That's because they are an appellate court, not fact finders. We, who yearn for wisdom and thirst for knowledge, always understand there are many things they

cannot do or say they cannot do, and so it comes back to us to do in the first instance. But this is the hoof and woof of our business, fact finding. If we can't determine that, no one can.

Mr. Lips: Your Honor, to—the end that—the question presented to the Court is whether or not a TRO should be issued, not whether or not the Court in its ultimate wisdom—

The Court: Who finds the facts, then?

Mr. Lips: In what case?

The Court: No one, in the here and the now?

Mr. Lips: In every case where secondary boycott is alleged and established, as here, where people are actually being injured, there is never a Board decision or any other decider of fact to deal with that case yet, because it's too premature. The Supreme Court has wound the thing back to the point where the Board has to make the decision in the first instance.

[42] So, necessarily, there is no decision that binds this Court absolutely to follow it. What the Board has asked the Court and what we ask the Court is that the status quo be maintained.

The Court: They want to change it.

Mr. Lips: The status quo was that truckers and warehousemen loaded and unloaded containers before the Rules on Containers were negotiated.

The Court: You know, it's like countries which invade each other. There is always a status quo, depending how far back you want to go. You know, '68 was one status quo, '80 was a different status quo.

Mr. Lips: The status quo changes. When the status quo changed in favor of the ILA in the early '70's, a variety of courts enjoined it because under that legal theory they felt

it was improper action. That's out of the window. There are other theories, the Court said the Board should have examined at that time, which it didn't.

The Board—I don't for a minute think that the Board's wisdom is absolute. But what we do argue here is that under the statutory scheme it has the obligation and we have the right to present in a factual hearing evidence to countermand that thick book.

We've got tons of affidavits. There has been an extensive investigation going on. That's the forum it [43] seems to us where the statute contemplates.

The Court: Are you from Steptoe & Johnson?

Mr. Lips: No.

Mr. Fortunato: Your Honor, I should interject. Mr. Lips is from the Cincinnati firm of Taft, Stettinius & Hollister, and ask he be admitted in this court.

The Court: Of course, you are welcome. I thought you were because I had some recollection there was another gentleman from Washington who was—

Mr. Lips: Yes. I'm from Cincinnati.

The Court: I'm sorry.

Mr. Lips: Mr. Schneiderman was from Steptoe & Johnson in an earlier case.

The Court: It was the same case, I think, or the same parties.

Mr. Lips: There are cases like this.

Mr. Lambos: It was Mr. Whiting, your Honor.

Mr. Lips: My apologies. I just assumed it was Mr. Schneiderman.

When the ILA says no one is being injured and the sea carriers are volunteering to do all this, that's not right. Mr. Gleason says if they don't get it right the sea carriers will pay $500 million a year.

The Court: Oh, please. I have no—I can't [44] do anything about these things. I mean, I assure you that I didn't —while I'm sorry if anybody is out of work, I didn't pay that any mind in terms of making a decision here. What is obvious, if somebody does the work and somebody else doesn't do the work.

Mr. Lips: That's right.

The Court: Not a case of—

Mr. Lips: Right. It's a question here of whether or not the parties should continue on with a course of action they've been following for seven or eight years during this latest, if you will, period, or whether or not overnight many, many companies are going to be put out of business. We have companies today that are out of business because of the enforcement of the rules starting last Friday. They cannot get containers. The ones that have been shipped in to them, can't get the ones to ship out.

The Court: It is the great misfortune of judges that somebody gets hurt in all these things, you know? Something moves from one side of the room to another all the time.

You know, I can no more protect every workman than protect every containerization company. I understand that.

Something else you said, though, troubles me. [45] You said that the beneficial owners of these containers—that is to say, the people who are doing the shipping—can't do it.

Mr. Lips: That's correct.

The Court: But your adversary says under the rules they can.

Mr. Lips: Well, the term "beneficial owner" is a word the ILA and the sea carriers have made up. Perhaps in actual fact is when Procter & Gamble wants to send some

goods of a less than container load kind to the Port of New York, it will contact or contract with something called a non-vessel operating common carrier.

The Court: That's you.

Mr. Lips: That's not me. I represent the American Trucking Association, whose members are largely warehousemen and local cartage carriers and over-the-road truckers.

The Court: They will be the ones that drive the container.

Mr. Lips: They'll drive it. They'll also—

The Court: But the other one you mentioned—

Mr. Lips: The non-vessel operators.

The Court: —that will be like the CONEX and Twin-Ex people.

Mr. Lips: They are what is known as [46] consolidators.

The Court: They are the middlemen?

Mr. Lips: Yes.

[47] The Court: Instead of dealing directly with the ship and the owner of the container in our Procter & Gamble hypthetical, Proctor & Gamble will contact a middleman, CONEX or Twin-Ex?

Mr. Lips: That's correct.

The Court: CONEX or Twin-Ex, instead of Proctor & Gamble getting the container, CONEX and Twin-Ex will get the container for Proctor & Gamble?

Mr. Lips: That's correct.

The Court: Proctor & Gamble will truck the stuff over to Twin-Ex and CONEX using your people, then. They will stuff the stuff there. Pardon me.

Mr. Lips: Exactly the right word.

The Court: I knew the first "stuff" was right. The next "stuff" was unnecessary.

Then they'd send it down to the Port using your men, people?

Mr. Lips: Yes.

The Court: I understand.

Mr. Lips: But what you have is other shippers sending things in. So Proctor & Gamble really, in this example, is sending less and—a full container less. So the business of the NVOCC, the consolidator, is not the same as the vessel operator. Doesn't provide the same operator.

The Court: Only to the extent they are partial [48] containers?

Mr. Lips: No. They issue bills of lading covering the entire freight movement. The ship owners don't do that. They are not responsible.

The Court: I understand. But Proctor & Gamble—before there was such a thing as a CONEX or Twin-Ex or such a thing, what did Proctor & Gamble do?

Mr. Lips: Proctor & Gamble either held the shipment back in Cincinnati until they got a full load of something and sent it on, or they sent it a box at a time. In some cases to our clients' warehousing—

The Court: Didn't they maintain warehouses on the port, so forth?

Mr. Lips: No. They used some of our clients who have hundreds of thousands of square feet of warehousing in town that have been doing business like this for many years before the rules on containers came in. Our clients are being affected by the rules on containers in the same way as the NVOCC.

So before, when Proctor & Gamble sent it into our warehouse and said, "Now, you keep it here until we're ready to send it out and then you send it to London"—

The Court: I begin to see. This whole issue arises because of the need to ship less than full containers?

Mr. Lips: That is mostly the problem. But it also [49] involves full loads. For example, on the port side, when a full load would come in, it would be turned over to one of our clients, a trucker, who would take it to his freight station. Now, here's what happens: You got a 20-foot container coming from Germany going inland somewhere. The trucker can't economically operate the truck hundreds of miles away pulling half a load, so he'll bring the 20-foot container to his freight station. He'll bring another 20-foot container going in the same way, deconsolidate the load on the freight station, a decision he's making himself with the owner's consent, the consignee's consent. He'll put it on one 40-foot piece of road equipment, then truck it up the road, send the containers back to the pier which he's paying per diem on, anyway. He's off on his own doing business with the customer.

The Court: What is the present ILA rules with the shippers on offloading?

Mr. Lips: Same thing. Those rules say we can't do it. They won't give us the containers now. Our customers suffer and we suffer. We can't do our business because the ILA says anything that anybody would strip within 50 miles of the port, where those goods don't belong to the beneficial owner or the guy within 50 miles who is going to consume them, then that work is ours and you guys can't do it.

Any shipping company that gives those containers out we're going to fine $1,000. So, naturally, the shipping [50] companies, they're not going to give it to anybody who they know for the first time is going to strip a container.

The Court: But if the beneficial owner were to strip it they wouldn't do that; is that right?

Mr. Lips: That's correct. That is where the discrimination comes in. We say as a common carrier they are obliged to treat all people alike once they release the container.

Mr. Lambos: Or anybody outside the port area which we define as 50 miles around the port.

The Court: I understand. You got a congruous circle of 50 miles.

Mr. Gleason: Your Honor, Mr. Lips, I guess, you know, knows a little. I don't think some of the things are accurate, what he's telling you.

First of all, if Proctor & Gamble has several cases, they don't wait. They put it on a truck. That truck—his client would take those cases and bring them right down to the pier, where the longshoremen would then put them in a container. The problem is here they don't hold up.

So far as him talking of his clients, what has happened is they had containers—this was the Huff case. What they did was they actually lied on the bill of lading. They would say that the freight was going 200 miles. They were delivering it in the container to the steamship line. What [51] they were doing is taking it five miles away and getting guys, no union people, alcoholics, you name them, take the freight off and then put it in a truck and then send the container back. When the steamship companies found out that they were not delivering the freight to the consignee in the container, then they pulled their agreement. We never told them to pull the agreement. We just told them they were short stopping.

[52] Mr. Lips: The evidence pending before the Board has been gathered in all these affidavits. The Board stands

ready to evaluate. It doesn't support that, and contradicts it, as a matter of fact. There are many cases where union representatives have come into our warehouses and said, "We want to walk through your warehouse. We want to inspect to see what you do. If we find you got goods that came out of containers that we claim is ours, then you're not going to get any more containers. All your employers, whether represented by the Teamsters union or non-union or whoever they are represented, they are out of business.

The Court: With due regard to Mr. Gleason and to you, these are very interesting insights into the way in which these things run, but of no great legal significance because either the union has a right to demand job protection in the offloading of the contents of containers, or they don't.

Mr. Lips: That's correct.

The Court: Really, it is a fascinating—

Mr. Lips: It's a fascinating case, your Honor. The Supreme Court—I made the same arguments to the Supreme Court as did Mr. Gleason. It said it's not up to courts in the first instance to resolve this complex thing. It is up to the agency that has the experience in [53] the industry for years to determine. It remanded.

The Court: Why doesn't the agency sign its injunction?

Mr. Lips: I don't think the agency has any authority to issue an injunction.

The Court: As long as my name is going to be on the injunction, it's going to be an injunction I believe in. Not just because they believe in it.

Mr. Lips: No question.

The Court: I'm sure the Third Circuit wouldn't want me to follow any other course.

Mr. Lips: You shouldn't misconceive that there is grave injury occurring today and in fact that is a boycott. When

you refuse to give containers out or you refuse to give somebody goods that he has shipped, that's boycott.

The Court: They don't refuse to give you the goods. They don't refuse to give the containers. They refuse to give you the containers unless you use their employees to stuff them.

Mr. Lips: Yes. But the shipper who has paid the freight then has to pay an additional surcharge for the extra expense.

The Court: I understand.

Mr. Lips: He's entered into a contract with [54] the sea carriers.

The Court: I understand.

Mr. Lips: Based on the tariffs.

The Court: Suppose there were a factory that made suits. Say there was an assembly line. Suppose one part of the line sewed an arm on it, the next sewed another leg on. Then the employer decided he wanted to ship that body out, get the other leg sewn on outside by some other group of men, women, then come on in, then get the last arm sewed on.

Mr. Lips: Come back, you mean?

The Court: Yes.

Mr. Lips: Yes.

The Court: Could the union bargain to keep that work?

Mr. Lips: If the union had always sewn that portion that was sent out and it is, therefore, their work, it could bargain to preserve it. That's what the Supreme Court said could be done in the National Woodworkers' case. You can't send work out to have some place else and bring it back.

Here we don't have that. Work is not sent out and brought back. Not subcontracted and brought back. Passed on through the pipeline.

What the union is really complaining about here [55] is work that disappeared when it gave the sea carriers the right to use the containers and in return got back millions of dollars of royalty payments. They sold out their right to do this work. Now they want some of it back.

The Court: When did they do that?

Mr. Lips: In the original agreements.

The Court: What year was that?

Mr. Lips: 1968, I think, was the original agreement.

The Court: In those original agreements did they retain any rights?

Mr. Lips: Well, in the 1959 agreement, which was localized in the Port of New York initially, the ILA said—and I'm sure Mr. Gleason will correct me if this is wrong—but the ILA, I'm paraphrasing, said the sea carriers have the right to use containers. And in return we'll get some benefits here. There was a carte blanche right to use the containers initially.

Then thereafter every amendment of the rules was an effort to tighten up and bring back or acquire work that initially they had recognized wasn't theirs to begin with.

Now, the issue in this case at this point in time, of course, is where is the ILA's work history and [56] how does it relate to the container? That container, although you might say it is part of the ship on the ship, becomes part of the truck when it is on the truck; becomes part of the railroad flatcar just as much when it is there.

Does the railroad employee have the right to unload it at the end of the line? Not if it is the union's right to unload it on the seaport. At some point the union's authority over this work, if it isn't the same work, slips away. I don't believe it's the same work.

The transportation system itself, of which containerization is a part of, the whole intermodal transportation

system where the passage of goods through the system has changed so dramatically, what has really happened here is a metamorphosis. The great bulk of the system was a caterpillar, now the intermodal system is the butterfly.

The Court: What about firemen on electric trains?

Mr. Lips: I don't understand the question. I know the example you are raising, but I don't know what the question is.

The Court: The question is, can a union require that?

Mr. Lips: Can they?

[57] The Court: That's what I just asked you.

Mr. Lips: I don't know what a fireman on a train does. If there is work—

The Court: They generally put the wood in the fire.

Mr. Lips: They did more than that, as I understood.

The Court: Didn't you watch the movies on TV?

Mr. Lips: As I understood it, they also oiled the wheels. All the firemen's work wasn't eliminated.

The Court: That isn't what the employers were saying.

Mr. Lips: You got me. You predate me on that one. I don't know what the firemen did. I know some of his work was eliminated.

[58] The Court: Yes. You know they used to put coal in?

Mr. Lips: Every kind of innovation changes a job. At some point it changes so dramatically that it ceases to be the same work at all.

The Union says: What work going on now is a functional equivalent of their work? The Supreme Court didn't adopt that test, either. They said, "We don't really know what is a functional equivalent. It is something the Board has to get into."

But the work preservation theory, of course, is the more difficult theory. Where you actually draw the line is the

more difficult theory on work preservation. But for purposes of this injunction, your Honor, it is clear to me, at least, that under the Supreme Court cases interpreting the Federal Maritime Law, the Federal Maritime decision, itself, that interprets these rules, the sea carriers do not have the legal right to withhold these containers on a discriminatory basis. Under the tariffs that are published, they don't have the legal right to change the terms of the contract of carriage entered into.

The Supreme Court in the Pipefitters decision took the position that even if the work belonged to the union seeking it, if their employer—in this case the sea carriers—don't have the ability to give that work to them, then it's an [59] unlawful hot cargo agreement and any effort to enforce it, such as is going on here, is a secondary boycott effort. In this case, we say that since the sea carriers don't have the legal right to withhold those containers so that the ILA can stuff and strip them, then in that case it's a secondary boycott. That is established as a matter of law, it seems to us. Very little, if any, evidence that needs to be evaluated by this Court.

The Court: Are these ships made for these containers?

Mr. Lips: Some of them. Some of them are modified. In the early days, it is my understanding the containers were actually lashed on top of the break bulk ships. There are specialty container ships. As a rule, they are now being interpreted, your Honor—they are going to be applied to truck trailers that belong to our clients that go on a ship called a ro-ro ship, where it is pulled onto the ship, tied down—it's our truck—and it is being hauled to Puerto Rico and pulled off.

Mr. Lambos: Absolutely not. You can send your container down. We will take it and put it in our ship. We

will send it where you want. You just pay for that passage. You will have your container on it. As the Supreme Court of the United States—and Mr. Lips, you were there, and you should know better—we said, and the Supreme Court agreed, [60] that we were talking about our containers only; the steamship company containers.

The Court: Who—

Mr. Lips: That is not true, your Honor, because 50 percent of all the containers in use don't belong to the sea carriers.

The Court: If I were you, I would take it as true and order the minutes—

Mr. Lips: I'll have the minutes.

The Court: —and pick up your chips.

Look, are these containers part of the ship?

Mr. Lips: Yes, your Honor.

Mr. Lambos: Yes, your Honor. The Supreme Court of the United States and Judge Friendly, Mr. Justice Marshall in other cases—I'll get you the citations in a moment —said in cases interpreting the Longshoremen Harbor Workers Act that the container is nothing more than an extension of the ship. A container is nothing more than the hatch of a ship. It is a substitute for the ship.

And when the Supreme Court was saying that, it said it not once. In the early days, where Judge Marshall said it—but it was again said by Mr. Justice Powell is a second case, and it was said by Judge Friendly. So everybody, understands that the container is merely a substitute for the ship. And it is Northeast Marine Terminal Company against [61] Caputo, 432 U.S., 439, where that was said. And in P.C. Pfiffer Company against Ford, in this particular brief we had the Law Week citation, November 27th,

1979, 48 U.S. Law Week, 4018. We will supply the Court with—

The Court: When you give it to a customer, is it insured?

Mr. Lambos: Yes, your Honor.

The Court: Separately from— how does that work?

Mr. Lips: It is upleased through the interchange agreement that Mr. Lambos brought up.

[62] Mr. Lambos: That container has to get back to us. We charge per diem for it. We charge rental for it. We charge them if they damage it. We ensure our interest in that container. We have in most cases, in almost all cases, our names, Dart Line, U.S. Line, Sea-Land Service, whatever the name of the steamship line may be, is on that container.

And as Mr. Lips pointed out, not all the containers are owned by us. But if they are not owned by us, they are leased by us, totally and completely. And the rules make plain that they don't apply to containers owned by Mr. Lips, his clients—

The Court: Can they send their own containers down there?

Mr. Lambos: Yes.

The Court: In other words, if they want to consolidate, let's say Procter & Gamble and—wants to send half a load, somebody else wants to send half a load, they go to CONEX and Twin-Ex or Twin-Ex and CONEX uses their own container, will you take their container?

Mr. Lambos: Yes, your Honor.

The Court: Will the ILA require you to strip it and then stuff it again?

Mr. Lambos: No, your Honor. In fact, we enjoined the ILA from doing that many, many years ago in [63] the

'50's. There was a case involving Union Carbide. We can get you that decision. We obtained an injunction. Since that time, the ILA has said all we are talking about is your container and not somebody else's container.

The Court: Mr. Board—

Mr. Lambos: That's 54 LLRM 2680, New York Shipping Association against International Longshoremen's Association.

The Court: Why isn't that a compromise that you people can live with. If CONEX and Twin-Ex want to be in this business and use their own containers, they can.

The issue is, here, that the employer owns a container that is usually attached to a ship. It is true that the two leave each other sometimes, but only for the purpose of getting filled up with things to go back on the ship. The employees of that employer, namely, the people who are in the employer-employee relationship of loading and off-loading the ship, and its appurtenances, regard any loading or unloading of that to be theirs.

CONEX and Twin-Ex, however, are not prohibited from being in business, nor this gentleman's client, from shipping CONEX and Twin-Ex business, provided they use their containers which are not part of the ship.

Mr. Fitzsimmons: Well, first of all, your Honor, we are talking about what is part of the ship and [64] what is not part of the ship.

I would draw your Honor's attention to Footnote 23 of the Supreme Court's ILA decision in which Mr. Justice Marshall states, "We need hardly add that the analysis is not, as the parties have sometimes seemed to suggest, simply a matter of deciding whether a container is more like the hold of a ship or more like a big box. The usefulness of a container lies precisely in the fact that it may

function as an integral part of the hold while it is aboard a vessel, as a trailer when it is transported by truck, and as part of a railroad car when it is carried by rail. We can't reduce it to that.

The Court: He doesn't say we can't consider that. He just says all those things. It doesn't affirmatively say anything or negatively say anything.

Mr. Fitzsimmons: But it is not the hold of a ship.

The Court: I'm talking about as a practical human being now to you.

Mr. Lips: Can I ask that from an industry point of view why it can't be done?

The Court: Yes, I guess you can.

Mr. Fitzsimmons: Thank you, your Honor.

The Court: Go ahead.

Mr. Lips: For the simple reason—

[65] The Court: But it is his great discretion that I'm supposed to be bound into.

Mr. Lips: He's perfectly happy.

Mr. Fitzsimmons: I think Mr. Lips will give you a better explanation of the fact than I could, your Honor, although I would note—

The Court: But it is your discretion that I am to bow to, not his.

Mr. Fitzsimmons: —the amazing difference in facts we've seen just between the arts of counsel. I guarantee your Honor when the hearing begins you will hear facts that have been assembled for years. The parties have been through years of litigation. We'll hear legal theories that will go on ad infinitum as well.

I suggest to your Honor, all we simply have to show you is that we have reasonable cause to believe that certain facts exist and our legal theory is—I forget it myself. I'm sorry.

The Court: Plausible?

Mr. Fitzsimmons: Substantial but not frivolous.

The Court: Plausible, is it?

[66] Mr. Fitzsimmons: The ultimate merits of this case are not before your Honor. I know your Honor has seemed to suggest to us that we must convince you of the validity of our argument. I respectfully suggest to you that we do not. We must only convince you that the argument is not substantial and not frivolous and there is reasonable cause for the Regional Director to believe that a certain set of facts could occur or have occurred.

The Court: That's the standard for preliminary injunction, isn't it?

Mr. Fitzsimmons: That's correct, your Honor.

The standard for a TRO is that it is likely we would prevail on the merits of our case. The merits of our case, your Honor, is the temporary injunction. It's not the full merits of the case.

Mr. Lips: Your Honor—

The Court: You were going to answer the question about why that isn't a satisfactory compromise.

Mr. Lips: Yes. There are two points I want to make.

First of all, the rules, themselves, which have been published effective January 1st—I'm reading from an International Longshoremen's Association publication on them—quotes the rule that is in effect.

"Containers owned, leased or used by carriers, [67] including containers on wheels and trailers, are covered by the rules."

Now, that means that all the containers that are owned by the railroads that are used by the sea carriers to transport cargo on ships.

The Court: Do you agree with that?

Mr. Lambos: No, your Honor.

Mr. Gleason: No, your Honor.

Mr. Lips: Let me finish, please.

The Court: I'll get a stipulation for you.

Mr. Lips: Furthermore, Mr. Gleason was asked this question specifically by Justice Burger, I believe it was. I have the transcript. We cited it to the Board.

Mr. Gleason specifically admitted that any container that was owned by somebody else that was stripped or stuffed within 50 miles would be covered by the rules.

The Court: You haven't answered my question.

Mr. Lips: That is Point 1.

Point 2 is the reason it is impractical for other people to hire—I mean, to purchase containers, is for the same reason that it is impractical for anybody to buy his own railroad car, because the equipment ends up all over the world. It doesn't come back to the—very readily to the point of shipment.

So a container shipped out of New York today may [68] end up in Hong Kong eventually before it gets back.

The Court: More convenient if they stay with the ship, isn't it?

Mr. Lips: No. They are not built to stay with the ship. They are built to be transported by the ship.

The Court: I know. Then retransported?

Mr. Lips: By some other ship, maybe. Brought back by some different line.

The Court: But you have goods going in both directions, don't you?

Mr. Lips: No. We have customers that ship only to Liverpool. We have clients that ship only to Puerto Rico. We don't have the facility any more than any shipper has to hire his own railroad car to go to Kansas City and back

again. That is why the sea carriers have been licensed as public carriers. The very definition of common carrier is that you got to give common service. They are withholding common service. That is the right of control argument. Since they cannot legally withhold that common service, they cannot give the work to the ILA, even if it was theirs. Therefore, under the Supreme Court test of enterprise—

The Court: Why didn't the Supreme Court say that?

Mr. Lips: It did. In the enterprise case?

The Court: No. In this case.

[69] Mr. Lips: Because the right to control argument had not been raised below. We raised it in the Supreme Court. We wanted the Supreme Court to decide all these issues.

I'm sure our worthy brother wanted them, too, and end the case. But the Supreme Court said, "No. It is not before us." The reason it wasn't raised before in the early cases was that the Labor Board was satisfied with the work preservation theory it never had to get to the right to control argument because the right to control only comes into effect if the work is established to be ILA's.

The Court: Gentlemen, I'm going to take a ten-minute recess. Please remain seated.

(Recess.)

The Court: Have you all said everything you wanted to say within reason?

Mr. Lips: I'd just like to clarify this one point, your Honor, about the Union position. I want to quote some of the record in the Supreme Court when—the dialogue referred to before. Questions by the Court. I think this was Justice Burger.

"What is the result of seeing a particular label on one container? The ownership, it belongs to a consolidator,

let's say, the container ownership. What happens then?

"Mr. Gleason: If a container came in and it was [70] a consolidator's container then they, the ILA members, would like to see whether or not the work was done within the 50-mile radius.

"Question: And, then, if it is within the 50-mile radius?

"Mr. Gleason: If it was done within the 50-mile radius, we would tell the company that this was a violation. We'd have to strip the container.

"Tell us precisely.

"Mr. Gleason: Then they would strip the container and load it in another container."

In other words, what Mr. Gleason said to the Supreme Court was: "We don't care who owns the container. If it is done within 50 miles we're going to redo it and charge the customer. Obviously, the customer is not going to pay for it thereafter, which puts us out of business."

[71] Mr. Lambos: Your Honor, in response to Mr. Lips, who argued in the Supreme Court, he well knows that Footnote 13 of the Court's opinion says: "Therefore, we, the Supreme Court, like the Board, and the Court of appeals, assume that the Rules on Containers have application only to containers that belong to the contracting employers."

And again we say to Mr. Lips, as he well knows—

The Court: You say that footnote is correct?

Mr. Lambos: That footnote is absolutely correct.

The Court: You say that footnote should be correct, but they say it?

Mr. Lips: I don't say it should be correct. I don't say it? That footnote is in the majority opinion, I believe. It is not based on a fact in the record.

The Court: Let me ask you a question.

Mr. Lips: I'm sorry.

The Court: Suppose it were the fact, would it be a fact which made a difference to you?

Mr. Lips: With respect to this proceeding? No, it wouldn't make no difference to me, because—

The Court: So, therefore, it becomes immaterial whether in your view Mr. Gleason said that to Chief Justice Burger or not?

[72] Mr. Lips: It's not very material, except that I want the Court to understand that I was not misrepresenting to the Court.

The Court: I believe you. I can see you are a man of rectitude. Mr. Gleason, too. It may be he misunderstood Mr. Chief Justice—Chief Justice Burger's question.

In any event, if I were you, I would be delighted at what they have said here. And, as a matter of fact, I may require, if I do require, would you have any problem entering into such a formal stipulation with him?

Mr. Gleason: None whatsoever, your Honor.

Mr. Lambos: None, your Honor.

Mr. Lips: Of course, that doesn't get to the heart of the matter, because you are talking about an agreement to do nothing to zero containers. There are none owned by anybody other than 50 percent of the containers owned by the shipping companies about and 50 percent owned by leasing companies that lease them to the shipping company and the railroad and other people. That's who owns the containers.

The Court: Tell me something: Suppose these containers were attached to the ship with a very long cord, 50 miles long, clearly the ILA would have a right [73] to demand to be the only people who load those containers if the containers were still on the ship, isn't that right? You

wouldn't dispute that would be work preservation, would you?

Mr. Lips: I wouldn't dispute that they have the right to unload and load all containers at the seaport terminal. It's when they only claim part of them and thereby create a discriminatory situation.

The Court: Suppose your client wanted to broker this thing without ever taking command of the containers. Suppose your client was sitting there in Maryland or whatever they are. You represent the trucker. Suppose it was CONEX down there and they said, "Well, we'll lease the container. We'll get half a load from Procter & Gamble and half a load from whomever else," I don't know of the name. And they make the deal and use your trucking company to truck it down.

Could it use CONEX or Twin-Ex employees to load each portion of that container at the terminal?

Mr. Lips: At the seaport terminal?

The Court: Yes.

Mr. Lips: I don't suppose that there is any possibility that someone could come into the area that is covered by the bargaining agreement, the seaport terminal, where the ILA has had exclusive jurisdiction for years, [74] and do the ILA work at the seaport terminal.

The Court: So the real issue is whether you can take the container out?

Mr. Lips: No. I don't think that's the real issue. The real issue is who can load and unload them once they are out. They haven't kept them all at the seaport terminal. They have released some to some people and some to other people, with different conditions attached to them. And they discriminate against trucking companies who want for

their own purposes to strip those containers and put it in their own road equipment for which they've paid good capital for and have to get a return on investment.

[75] The Court: Let me see if I understand. What do the truckers have to do with this?

Mr. Lips: Two ways. First of all, let's take an over-the-road carrier. The over-the-road carrier has a freight station in—within 50 miles. This freight station handles truckers' freight. It handles freight coming across the sea and everything. That trucker is charged with responsibility by his customer of picking up a container and hauling it 400 miles inland.

They go to the pier, pick up the container. That is, the container will be—it is a box that is physically dropped on a wheel chassis and hooked onto his truck. He hauls it away. The general public can't tell you the difference between a containerized or non-containerized vehicle.

So, he'll haul it, particularly in the short haul area as around New York, he'll haul it, if it is a full container load, filled with one product from one shipper to one receiver. If it is a short haul where the much heavier container won't damage the highway or create a safety hazard going around the mountain or something like that, not built like road equipment, he may haul it directly there and deposit it.

Then the manufacturer, or somebody, maybe some warehouse out there, will unload the stuff and store [76] it or use it at that location.

Now, however, if he's got two 200 footers or let's say he's got a 40-foot container and he wants to put it on a 45-foot truck and add five feet of freight to it, then he'll stop at a freight station, deconsolidate it, put it in his own road equipment and send it up the road.

The rules prevent that. Also, our clients are—

The Court: You mean he wants to—

Mr. Lips: He wants to.

The Court: He wants to use the ship's containers?

Mr. Lips: No, he doesn't want to use it. He wants to take the cargo out of it at his freight station within 50 miles, send that container back to the ship for which he's paying a per diem rental rate, take that same cargo, put it in his own piece of road equipment, his tractor-trailer truck, and send it on the way.

The ILA won't permit him to do that under these rules.

The Court: He gets this from where?

Mr. Lips: He goes to the seaport terminal and says, "I want to pick up a container that came from Rotterdam, here is the number."

The Court: This is an offloading problem?

[77] Mr. Lips: Yes. We are talking about export at the moment. I'm sorry, import at the moment.

The Court: Right.

Mr. Lips: He's bringing it in.

The Court: Right.

Mr. Lips: Similar dynamics occur on the way out, not as frequent. It is more of a problem for the trucker.

The Court: Who asks him to pick it up?

Mr. Lips: His customer, the importer. It might be Procter & Gamble or it might be a broker.

The Court: I thought under the rules why can't Procter & Gamble unpack its own container?

Mr. Lips: It can, your Honor.

The Court: Or use its own agents.

Mr. Lambos: They have no problem. They have no problem as long as they pick it up and take it to their

place of business where with their own employees they unload the container. If Mr. Lips wants to, they can come down to the pier and say "We don't want your container at all. Unload the container right here into our trucks. We'll take it off." They have that option.

But if they come down and say, "We want that container which is consigned to Dayton—to pick up for Procter & Gamble's plant in Dayton"—we say, "Fine, take it to Dayton," because we've told our people that if somebody [78] else is going to do the work in that surrounding area, many cases only a few blocks away, the ILA will do it. The ILA will give you, Mr. Procter & Gamble, the work or you take the container to your own place of business where you unload it with your own employees or you can take the container to any place outside the 50 miles where you can have it unloaded with any employees.

The Court: In other words, if the container comes off, whether it is fully loaded or partially loaded?

Mr. Lambos: Yes, your Honor.

The Court: And a trucker comes in with his own truck, that is to say—

Mr. Lips: Road equipment.

The Court: Thank you. I'm trying to remember from my interstate highway theft cases.

Mr. Caruso: Tractor.

Mr. Lips: Trailer.

The Court: Trailer. His own trailer. Of course, he got his own tractor. If he has his own trailer, then he doesn't need by definition the ship's—this container.

Mr. Lambos: That's correct. We have a service of providing that we move that cargo from the container into his trailer, assisting his employee who stands on the tail-

gate of the truck and puts—of the [79] trailer—and takes the cargo and puts it into the trailer.

The Court: I see.

Mr. Lambos: He's free to do that. He doesn't want to do that.

The Court: He wants to take it away?

Mr. Lambos: He wants to take it away, cross the street, to use his employees to unload that container when Procter & Gamble—for his convenience.

[80] The Court: Procter & Gamble even can take it across the street and do it?

Mr. Lambos: Procter & Gamble can take it across the street and do it with their own employees, yes, sir.

The Court: The only people you say who cannot are the middleman?

Mr. Lambos: Yes.

Mr. Lips: No. No. Excuse me, your Honor. The motor carrier who Procter & Gamble has sent to pick it up is prevented from doing it.

The Court: Not if they work for Procter & Gamble.

Mr. Lips: Roadway express is ordered by Procter & Gamble.

The Court: No, but you're a middleman.

Mr. Lips: Okay.

The Court: You're not Procter & Gamble.

Mr. Lips: That's correct.

The Court: Procter & Gamble could have its own trucks, and probably does.

Mr. Lambos: Yes, many of these people may have.

Mr. Lips: The ones in the local area, Procter & Gamble doesn't have any plants over here.

[81] The Court: We could pick a hypothetical.

Mr. Lips: I didn't understand your definition of middleman.

The Court: I'm sorry, you are quite correct.

Mr. Lips: You referred to the consolidator before, the NCO as middleman.

Mr. Lambos: I think this was very well set forth by the D.C. Court of Appeals for the circuit, 613 Federal Reporter second page, 890, in which it appears there was flagrant violation of these things by his client, Mr. Lips' client, who would come down and say "We're taking a container to West Virginia." They weren't.

The Court: There is federal law which requires the owner of the container to deliver the container rather than the goods? Is there?

Mr. Lips: Yes, sir. Shipping Acts.

The Court: The Shipping Act requires that the container leave the ship? In other words, could the shipper, if the shipper chose, say "We're not going to send the containers"?

Mr. Lips: The shipper is Procter & Gamble. Excuse me, your Honor.

The Court: Pardon me, you are quite correct. The ship owner.

Mr. Lips: I want to understand each other.

[82] The Court: You are quite correct. As corrected, do you want to take a whack at it?

Mr. Lips: Yes, sir. If the ship owners wished to take the position and wished to negotiate a contract with the ILA that said no container leave the seaport terminals without being stripped or stuffed, they are within our jurisdiction, we're going to treat them all alike, I presume they could make such an agreement if it didn't otherwise violate the work preservation standards.

The Court: Ha, ha. That's some concession.

Well, I understood what you said, though.

Mr. Lips: However, the problem is they haven't done that. What they've done is said most people can have them but some can't, and the Shipping Acts prohibit that. That goes to the question of the container, itself, not the cargo. The Shipping Acts say you must give non-discriminatory shipping service in vessels.

[83] The Court: Well, if in fact the union and the employer could negotiate that those containers don't leave—

Mr. Lips: We'd certainly have a different case.

The Court: —the terminal, they get packed there and unpacked there. You'd say that would be a different case. But you also, I think, indicated that that may well be lawful; if not unlawful.

Mr. Lips: Might be lawful.

Mr. Lambos: I think the Supreme Court said that would be lawful.

The Court: You know, fellows, I must tell you, I haven't been living and dying with this case for the past couple of years like you have. I haven't seen this case, until you walked in here, for a long time. I read with only academic interest what the Supreme Court said, what these other courts said at the time, because it was no longer with me. I had a good deal to do.

Mr. Lambos: Your Honor, the NLRB knew, because we gave them our blueprint on July, I think it was 2nd, of 1980, precisely what we were going to do. It is now the 5th of January. I think it unfair not only on your Honor, especially on your Honor, of course, but on all parties.

[84] The Court: Oh, I don't mean to cry. I just feel badly not having all this at my fingertips. I'm supposed to;

I just don't, you know. I guess you all said what you wanted to say.

Mr. Lambos: Yes, your Honor.

Mr. Gleason: The one thing I wanted to say, your Honor —the second thing is if the containers went to a warehouseman, it was in the normal course of business, we don't strip it, no matter who does the work.

The other thing is, as he mentioned—

The Court: What did you just say?

Mr. Gleason: If a container goes to a warehouse across the street from the pier and it is going in there, it's a bona fide warehouse and they issue a bill of lading from the warehouse, we don't strip it. That's under the rules.

Mr. Lips: Excuse me, go ahead.

Mr. Gleason: That's in the rules. If it states there within the normal course of business.

The Court: You mean somebody else can strip it there?

Mr. Gleason: Yes. Thirty days.

The Court: You know, I've been watching you in that row over there. You are having a terrific time. I know you don't like him. You think whatever he says [85] doesn't make sense. You are shaking your head and now you are outright laughing at him, and I don't like it.

Now, what do you mean, thirty days? It has to stay there 30 days, or what?

Mr. Gleason: Yes, your Honor. The normal course of business freight goes into a warehouse, it remains there for 30 days. If they take part out, take it out, five cases, ten cases, that type of business under the rules flows. We don't stop that type of business.

The Court: You mean in practice you don't stop it?

Mr. Gleason: Under the rules, even. So the only place we have that we are talking about, really, is the guy that

is not really in the business of consolidating freight. Most of these fellows are contract men. All they have is a pad, a pencil and a telephone. They contract out with people. That's 1.

Number 2, in some of the cases, I want to point this out, because it came up in the ICTC case, one of the factors. He mentioned Roadway, Roadway Trucking here in the Port of New York, is an ILA contractor that loads its trucks on the platforms. Even it was done by ILA Local 1730, which has contracts with the Empire Trucking Association and has 200 trucking companies under contract on their platforms for the loading and unloading of trucks, [86] we still strip it at the pier because it doesn't fall within the bargaining unit.

So, we don't play any—just because you are ILA, no matter whether it is Teamster or ILA, if it was done in the port we still strip it if it was not done at the pier under the rules.

Mr. Lips: Strike—

[87] The Court: The shipper—can the shipper make direct—I'm going to ask this of counsel for the shipper.

Can the shipper make direct arrangements with those who wish to ship less than the container load?

Mr. Lambos: Yes, your Honor. We have three million square feet of space in the Port of New York and New Jersey. And I think, if your Honor is interested, the facilities that we have are tremendous. In fact, a good part of our business—and we encourage it—is the bringing of cargo to facilities of this type. May I hand this up to your Honor?

The Court: Well, I'm in no good position to study that rather voluminous document right now.

Mr. Lambos: But we do have—

The Court: In other words, the feeling that I get is that the function of the CONEX and the Twin-Ex is plainly to deal with shippers who ship less than container loads. So they can consolidate them into a container load; is that right?

Mr. Lambos: That's right. Every facility.

The Court: You do that, too?

Mr. Lambos: Every major steamship carrier in the Port of New York has space varying from 180,000 square feet of warehouse space to over 500,000 of warehouse space, staffed with ILA. We commonly receive—in fact, I would [88] venture to say, your Honor, that most of the less than truckload cargo comes directly to the pier. That little part that goes to the CONEXes and Twins is not the greater portion or was not until the injunctions were put in. So what the ILA—

The Court: Historically, that was part of the work of ILA at the pier?

Mr. Lambos: Always has been. I think our Affidavits, here, indicate just as a fact that some three million man hours were expended in the Port of New York in 1979 in the stuffing and stripping of work at the pier facilities where we receive less than truckload or less than container-load cargos.

The Court: Now, the history of this business, what I'm understanding is, anyway, that in 1958 the first agreements were written about it.

Mr. Lambos: Yes. 1959, your Honor.

The Court: When did the containers first come into effect?

Mr. Lambos: The containers first came into effect on small movements during World War II, when the United

States Army used Dravo-sized containers. All of these containers, as our testimony indicates, were exclusively stuffed and stripped at the piers by the ILA, except there were two exceptions. I think there were maybe three [89] exceptions. One was the United States Mail, which the ILA traditionally permitted to move. The second was household goods belonging to military personnel, in the ILA's attempt to help the military personnel get their household goods moving.

And there was—then household effects belonging to one family, as well, at a later point.

The first steamship carrier that went into the container business and used almost full containerloads of ships was a company then called Pan Atlantic, which later became known as Sea-Land. They, for years, were the only ones in the Port of New York that—it was mostly in the Puerto Rican trade. Followed then by Seatrain and by TTT.

In those instances, the quote, "deal" that was made by the ILA is that you could move most of the containers that they called then "manufacturer's label" to where you wanted to. But you had to give us, the ILA at that time, you had to give the ILA the consolidated type of container. In 1959—

The Court: In other words, they would unpack them or strip them right then and there?

Mr. Lambos: That's right, your Honor. And the history of industrial warfare in the Port of New York shows that there was continual grievances, continual unrest by the workmen on the piers, who saw those containers as threats to their work opportunities.

[90] In 1959—and Mr. Lips should also be corrected here—we wish the ILA had given up its work jurisdiction.

They never did. Because there was a clause known as 8(c), which said that the steamship carriers would not directly or indirectly contract out the work of stuffing or stripping containers with non-ILA employees covered by those collective bargaining agreements.

In 1960, in 1962, in 1963 we then had industrial unrest. There were strikes in '62, '64, '68, '71. All on the container issue. All of these strikes were the ILA's attempts to hold onto as much of it as they could, and our attempts, very frankly, to take away as much as we could. And in this terrible period of warfare there came a Presidential meeting.

[91] The Court: He recommended a compromise, didn't he?

Mr. Lambos: Yes. David Cole, one of the greatest mediators.

The Court: As a matter of fact, it was this recommendation that you embodied in the agreement?

Mr. Lambos: The 1968 agreement was hammered out with Mr. David Cole. The Government of the United States pressured my clients after 57 days to agreeing to these rules and now some other general counsel who in 1970—the general counsel in 1970 examined these rules, determined that they were proper work preservation rules.

CONEX, ICTC by name, in 1970, brought an antitrust suit against us. The Second Circuit Court of Appeals found that the rules were not violative of the antitrust laws because they were reasonably related to the preservation of the ILA's work.

The Court: Is that the Allen Bradley doctrine?

Mr. Lambos: Yes.

The Court: Go ahead.

Mr. Lambos: In 1973.

The Court: In other words, the employer and employees

can meet and agree, provided it is over legitimate work issues.

[92] Mr. Lambos: And it is arms' length bargaining. Arms' length? How much more can we move arms' length with 300 work days of stoppages and strike? They want us to take some more now?

The Court: Let me ask you a question: I gather from what you said when you first stood up, or the second or third time, that you are not giving this work to the ILA right now under threat of strike, and that you are doing this because you wish to do it. Is that right?

Mr. Lambos: Yes, your Honor. Because we believe that in 1968 we hammered out a proper agreement—

The Court: If I were simply to restrain them from striking, you—I gather you wouldn't violate the contract, anyway, is that right?

Mr. Lambos: No, sir. We intend to live up to our collective bargaining agreement.

The Court: The only way you wouldn't is if I ordered you not to and that order is law, is that it?

Mr. Lambos: That's correct, your Honor.

The Court: I'd have to order you to break your contract for you to do it, is that right?

Mr. Lambos: That's right.

The Court: You're not adhering to it under pressure of the union or under threat of labor unrest?

Mr. Lambos: Your Honor, you know, when you [93] use the term "general term," I want to be as candid as I can with your Honor, threat of labor unrest—

The Court: In other words, you think it's a fair thing to do?

Mr. Lambos: We have stood before the Supreme Court of the United States, as I stand before you, and we have

said we think it is the fairest deal that we could get. Under the circumstances there are many people who might differ.

The Court: In other words, you are not doing this, you are not refraining from doing something because you're being picketed or something?

Mr. Lambos: No.

The Court: You think you made a good—

Mr. Lambos: Reasonable deal.

The Court: Under the aegis of a Presidential mediator, and you want to live up to it, is that it?

Mr. Lambos: Yes, sir. They gave up 100 percent and gave us 80 percent. And we gave them what used to be, before Board injunctions, 20 percent and is probably now 10 percent. We think we made a good deal not only for ourselves but for the public interest as well, because it did encourage innovation.

And there is something to be given to the ILA. We were compelled to do this by a requirement of law that [94] we bargained in good faith on the issue of work preservation. We think it is a reasonable, as the Court of Appeals has said, in the District of Columbia, it's the way Congress intended that the parties deal. What do they call it?

Mr. Caruso: Exemplary.

Mr. Lambos: Exemplary of self-government in collective bargaining. We agree with that.

Mr. Lips: Your Honor, a minor point on this. It can't be denied, I'm sure Mr. Lambos doesn't seriously intend to suggest that the agreement was not subject to economic pressure, to begin with, and throughout he has so admitted. The agreement stands, and he's compelled to say he honors the agreement because the ILA has said we will strike you if you don't agree to it.

Now, the purpose of the agreement is unlawful, the Board believes. They've issued a Complaint here. Therefore, it

cannot be that the parties, those two parties, rationally agree to a collective bargaining agreement that you would support if it is an unlawful agreement. The fact that they agreed to do it doesn't make it lawful, even if a federal mediator suggested they do it. The Labor Board is the guardian of public policy in that regard.

The Court: He claims the Labor Board approved it at the time.

[95] Mr. Lips: No, they didn't. That's what all this litigation is about.

[96] Mr. Fitzsimmons: My understanding is that at one time the Regional Director for this office did dismiss a charge involving those rules. That was sustained by the general counsel. At a later time another charge was filed. The general counsel at that time found merit to the charge and issued the Complaint.

The Court: A different general counsel?

Mr. Fitzsimmons: A different general counsel, your Honor. General counsels, for better or worse, are not bound by the acts of their predecessors. They are bound by the act of the Board.

The Board found the general counsel was correct and found there was a violation. Several Courts of Appeals—virtually every one, with the exception of the District of Columbia Circuit—to which the matter was presented, agreed with that determination. The District of Columbia did not and the Supreme Court did not. That is why the matter is back before the Board and back before your Honor.

Mr. Lips: Let me say one point about the economic dynamics of this. Mr. Gleason talks about what the 30-day warehouse rule is. That is his definition of what an appropriate warehouseman is. What is happening, there

is large public-private warehouses holding themselves out for warehousing within 50 miles who have become distribution centers. Let's say J.C. Penney wants to subcontract with one [97] of our clients to build a new warehouse and become a distribution center. That warehouse is distribution center for J. C. Penney. No other work is done in there. J. C. Penney says, "We want shoes from Italy. Send it to the East Coast."

They come in. Delivered in the container. Unloaded. Not the beneficial owner or user. It's a subcontractor, if you will, of the importer, J.C. Penney.

The warehouseman has been hired by J.C. Penney to do the warehousing. Then if, two weeks later, he wants to send five cartons of that up the road, that violates the rules, and the ILA then says, "Any container that is not warehoused for 30 days in that warehouse cannot be unloaded. If you are going to continue to do that, we won't give you any more containers." That is happening today in some ports. They have been told they won't get any more containers to service those warehouses.

Now, how can the ILA dictate to our people that they must hold these goods for 30 days? The point is, who asked for the service? Who pays for it and who specifies it? Proctor & Gamble, or whoever decides whether or not to use a sea carrier service on the pier or somebody else's.

The Court: You say that the ILA has the right in the port area to do all the loading and unloading?

Mr. Lips: In the seaport terminal?

[98] The Court: Yes.

Mr. Lips: They did that. With every container that came through they might have the right to do that.

The Court: What geographical area is the seaport area?

Mr. Lips: I don't know.

The Court: How about 50 miles?

Mr. Lips: I wouldn't agree that constitutes the seaport area. Fifty miles is closer to the seaport than 100 miles.

The Court: Well, the Attorney General claims the right to search everybody within 120 miles of the border.

Mr. Lips: But the gentleman who decides whether to use the ILA as service and the shipping company's service on pier? Who decides to use our service? The guy that pays the freight. The shipper or the importer. The Proctor & Gamble, or whoever will use the product. He wants to say, "Use the warehouse or use the trucking company to do this work."

Mr. Fitzsimmons: Your Honor, if I may?

The Court: I was not—I was listening to you. I didn't mean to be rude to you.

Mr. Lips: No.

One further point.

The Court: It's a very difficult case.

Mr. Lips: No question about it. But the NLRB, [99-A] its recent investigation in one of the ports has developed evidence that overwhelmingly demonstrates if the rules are enforced the likelihood—the work will not be driven back to the pier, as the ILA wants. What will happen is that the Proctor & Gamble will say, "We still don't want the ILA to do this. They break too much of our product," or whatever.

The Court: You'll get Mr. Gleason all upset.

Mr. Lips: That's the nicest thing I could say.

"We want somebody inland to do it." So all of that work, or most of it, will move inland, however far it takes to get away from the rules. That is what the investigation has demonstrated. That is partly why I'm sure the general counsel, who is a new general counsel, a different one—and if you paid attention to one-half of the Senate

confirmation hearings, you would even believe that he was pro labor. But—

The Court: What happened to the other half?

Mr. Lips: I'm sure they say that he's all right. I know they say he's all right. At least I didn't hear them say he was management's man.

But I'm saying now under current review, under current fact, this general counsel said he issued a complaint and he believes there is a violation of the statute.

[99-B] Mr. Fitzsimmons: I think your Honor has very succinctly summed up this case. It is your Honor who has to put his name on the injunction.

I respectfully suggest to your Honor, when your Honor makes that decision, however, that you act—that you are required to act pursuant to a very carefully drawn Congressional scheme. That scheme requires that the initial determination of the absolute validity of the parties' position be determined by the Board, subsequent to review by the Circuit Court of Appeals.

The Court: Well—

Mr. Fitzsimmons: I—

The Court: —that may be. I'm sorry. Did you want to say something else?

Mr. Fitzsimmons: I think under the standard that this Circuit Court of Appeals has interpreted that Congressional mandate, namely, that the Board has presented to you a theory that is substantial but not frivolous that we have done that.

I think we've been here for three and a half hours going back and forth on the various things. There have been seven years of litigation over this. There may very well be seven years more.

I find it hard to believe in this great morass of law and fact that we have not presented—we have [99-C] presented to you something that is totally frivolous.

For that reason, your Honor, I think that it is likely that we would succeed on the merits of our case. With that in mind—I don't think there is any dispute that the acts of the shippers and the ILA constitute irreparable injury to the charging parties. I haven't heard a word of dispute to that today. I don't think there is any dispute to that.

The only question we've had today—

The Court: I think it is quite clear that it is not irreparable harm. Indeed, there are plenty of lawsuits for damages in which real dollars are being alleged to salve their wounds.

Mr. Fitzsimmons: If you are placed out of business, your Honor—

The Court: Oh, come, now. What evidence do you have that they are out of business or about to go out of business?

In any event, they can still recover. Money they can get. They really can. As a matter of fact, treble damages is what they want, which is not only substantial remedy by this rise.

Mr. Fitzsimmons: If your Honor wishes, we have witnesses to present on the question of irreparable harm.

[99-D] The Court: You want to call witnesses now?

Mr. Fitzsimmons: If you are telling me that you are unconvinced there is irreparable injury—I assume—I haven't heard a word about irreparable injury all day. I assumed irreparable was given whether the legal theory was adequate.

The Court: You mean damages could not compensate for people's loss of business?

Mr. Fitzsimmons: If you are out of business, how can you put your business back together?

The Court: Is your client going out of business?

Mr. Lips: Some of my clients are.

The Court: Some are.

Mr. Lips: Some are. I don't think Roadway Express will go out of business because of this. Some of them are. There are witnesses in this room that can testify they are out of business now because they can't get containers.

The Court: Are they going to testify their harm is irreparable?

Mr. Lips: I think they will.

The Court: I don't think they will if pushed to whether or not money can do something for them.

Mr. Lips: Your Honor, I suggest 10(l) never [99-E] would have been put in the Act if money was always a remedy.

The Court: I know.

Mr. Lips: In a secondary boycott case.

The Court: He was talking about what, Rule 65, I think, weren't you?

Mr. Fitzsimmons: No, Section 10(l) requires the temporary restraining order that we show irreparable injury to the charging parties.

The Court: All right. I'll assume that there is irreparable harm, so you don't have to call witnesses. That is not your main thrust anyway, I don't think.

Mr. Lambos: It isn't, your Honor. Of course, we would like to make sure that your Honor understands that we were addressing ourselves to the arguments with respect to the temporary restraining order and we have pointed out quite clearly, and I think that the facts indicate, that irreparable harm would be there because there are facili-

ties whereby they could continue in business by bringing the goods down to the piers.

The Court: Let me ask you a question. Under the standard in this circuit, why shouldn't I grant not only a temporary restraining order but a preliminary injunction?

Mr. Lambos: Because, your Honor—

[99-F] The Court: He says the standard is as long as he doesn't speak with frivolity, or unsubstantiality.

Mr. Lambos: I think the standard in this circuit may be much, much more restrictive than it is in every other circuit except the Seventh. The Fourth Circuit finally having given up the standard, and so on. But—

The Court: The Fourth Circuit did what?

Mr. Lambos: The Fourth Circuit had followed the Third Circuit. In one of our cases determined that it would not apply the test of frivolity and insubstantiality, which I think means something more than the Board argues that it means.

First of all, they must say something in their papers other than "we believe." I have read the petition. I don't find any theory that they ask you to look at. I have read the Complaint issued against us and they have—

[99-G] The Court: Tell you the truth, if I didn't know the history of this case, or at least half remembered it—now it has been, of course, very much refreshed from these papers—it would be almost impossible, I think, to—

Mr. Lambos: I think your Honor must at least say there has been a theory presented so that your Honor can determine whether or not it is frivolous and insubstantial.

The Court: Can you say it is frivolous and insubstantial?

Mr. Lambos: Yes, your Honor. I would say it is definitely frivolous and insubstantial. I would say this—

The Court: That's the difference between advocates and Judges.

Mr. Lambos: I'd like to point out why I, as an advocate, would seek to make you, as a Judge, look at the papers. First of all, what are they doing here? What they have done is they have—and I use this advisedly—made up some charges to get back into a 10(l) situation when they should not be here at all before a District Court. Their remedies lie elsewhere.

The Court: What should they do?

Mr. Lambos: Your Honor, they should go before the Second Circuit Court of Appeals, the Fourth Circuit Court of Appeals, the Fifth Circuit Court of Appeals and say, "We are not going to have Judge Stern review and set aside the [99-H] action of the Court of Appeals for the Second Circuit in vacating its order enforcing the order."

They said, before the Second Circuit, "Don't do it. Hold it and keep these"—

The Court: What are they required to do now? Go before the Board, have a hearing and make new findings?

Mr. Lambos: Your Honor, all they need do, if they think they have irreparable injury and all the other things, is ask the Second Circuit Court of Appeals to reconsider its order.

The Court: No. I didn't ask you that. After the Supreme Court knocked them out?

Mr. Lambos: Yes, your Honor.

The Court: Don't they have to go back and hold another hearing before the Board?

Mr. Lambos: No, your Honor.

The Court: They don't?

Mr. Lambos: What we have said to them is, "You have a record."

The Court: I mean, when I say "hold another hearing," not necessarily have to bring in people. Don't they have to make a new opinion?

Mr. Lambos: Yes. They should make a new opinion.

The Court: The Second Circuit won't hear them until they've done something new in the Board. Isn't that [99-I] right?

Mr. Lambos: Yes. But the Second Circuit could have held on and not vacated its order.

The Court: You're not helping me, you know.

Mr. Lambos: In which event we would have been enjoined, in effect.

The Court: They didn't do that.

Mr. Lambos: The Second Circuit—what they are doing here, your Honor—

The Court: I know what they are doing here.

Mr. Lambos: —is saying—

The Court: They short-circuited, if you don't mind me saying that, their coming.

Mr. Lambos: The redistricting.

The Court: They don't want to wait until they go with the Board thing. Then the Board thing gets reviewed right in the Circuit, I guess.

Mr. Lambos: I'm saying today—today where they should have been is before Chief Judge Feinberg saying, "Judge"—

[99-J] The Court: What is the standard of review from a Board decision? I mean, not counsel's 10(1) application but a Board decision?

Mr. Lambos: Substantial evidence on the record as a whole. No error of law.

The Court: What?

Mr. Lambos: And, of course, the Court has complete authority to review all questions of law.

The Court: I detect a little dichotomy between the standard of a review from the actual Board's decision. Am I not correct, sir?

Mr. Fitzsimmons: Totally different, your Honor.

The Court: In other words, here you are entitled, if your legal theory is plausible—

Mr. Fitzsimmons: That's correct.

The Court: —to an injunction where—that is, if the theory of counsel is plausible, whereas the view of the Board, itself, is entitled to no great weight?

Mr. Fitzsimmons: That's correct, your Honor.

The Court: On law, if at all?

Mr. Fitzsimmons: That's correct.

Mr. Lambos: The standard set forth—

The Court: Please, don't do that.

[99-K] Mr. Lambos: Excuse me.

The Court: I think we've found—everybody has really had a chance to say what they wanted. Do you have one more thing?

Mr. Fitzsimmons: I would like to point out in response to Mr. Lambos I know of no decision, I don't think Mr. Lambos will cite us any decision, where the Third Circuit Court of Appeals has changed the standard for review.

The Court: You mean standard for a 10(1) injunction?

Mr. Fitzsimmons: Yes. I find it incredible that Mr. Lambos can say the theory is frivolous. We have been litigating that for years.

The Court: It is not frivolous. I would not find it to be frivolous.

Mr. Fitzsimmons: I'll rest. Thank you.

Mr. Lips: Your Honor, I would simply point out that

I spent no time defending the virtue of the Board's standard appearing here today. I think we have demonstrated on the merits of the arguments, threshold merits being the right of control argument, there is no question on the merits of that argument, injunction should issue.

The Court: Worried about his Honor's honor, [99-K-a] are you?

Mr. Lips: No.

[100] The Court: Good argument. You're a good lawyer. I understand your position.

Well, I have reviewed the papers. I've heard the arguments. I've been refreshed somewhat on the legal cases. This is a most difficult proceeding from every aspect, certainly procedural. You can hardly imagine a case more ensnared with appeals and Circuits and Supreme Court decisions, District Court opinions. There are differences between all these opinions, as there are bound to be, given the predilections of the different viewpoints of the various judges in the various courts that have considered it.

One thing is plain. This Court at this moment writes on a tabular rosa. There is no judicial precedent which binds us on the law of the case. That is to say, a legal opinion by a Superior Court on this case, for these parties or any of these parties on these facts. There are, of course, precedents from other cases which guide us and control to the extent that they are applicable, but as a result of the Supreme Court's opinion this is now de novo here.

First, I have to worry about the standard that I'm to apply here. I have two cases from my Circuit. I think both unanimous panel opinions. I think one by Judge Hunter and the other, I think, by Chief Judge Seitz, which indicate the language which the Board has quoted to me is, in fact, the language to be applied as language, as it is not

[101] insubstantial and not frivolous; that is, the Board's factual contentions and legal theory. Not merely a Temporary Restraining Order, but, I gather, a preliminary injunction should be issued preliminarily, I believe, to the final action of the Board—

Mr. Fitzsimmons: That's correct, your Honor.

The Court: —which is ultimately to be reviewed by the Court of Appeals.

I, of course, am bound by that language and must apply it. Nonetheless, I note that both of those cases that gave birth to that language was cases involving strikes, labor unrest. They were not cases where an employer and a union had contracted to bargain, reached an accord and some third party acting through the Board or the Board acting on behalf of some third party was challenging the agreement.

It is one thing for a Court to act swiftly as it has to act swiftly to preserve the status quo, to bring a strike to an end, picketing to a halt, so that the appropriate mechanism for settling labor disputes, as reflected by the national labor statutes, to wit. The Board, in its expertise, can be invoked in an air of quiet and calm and cool reflection.

It is one thing for a Court to act promptly and swiftly to bring such an action. It is quite another thing for a Judge to order, literally order, parties to disregard their contract. Just as it is clear to me that the Board's [102] position is not insubstantial and not frivolous, it is also clear to me that its position does not reflect a return to the so-called "status quo." It reflects in the Board's opinion of how the case should ultimately come out. Not the Board, really, but counsel or at least this counsel's view of it. And if I grant the dramatic relief which I'm asked to grant, I'll not be putting things on ice until people can decide

what is the appropriate thing to do. I'll be making very dramatic changes in the way people are doing business with each other. Not in a climate of strife or labor unrest at all, but dramatically altering the way an employer and its employees have chosen to allocate the responsibilities between them. That is the kind of thing which my sense tells me ought to be done only after mature reflection and only after a careful weighing of all of the equities, factors and consequences.

In other words, what I am being asked to do on an emergent basis does not seem to me to be something to end an emergency, but something likely to create one.

Second of all, I have grave concerns as to whether or not, in the context in which the dispute comes before me, it is justiciable at this moment at all in terms of a 10(1) injunction.

Who is the injunction to be aimed at? The Union? What is the Union doing? Nothing. The employer? In effect, [103] I would be requiring the employer to deal on a different basis than the employer chooses to deal with some third party.

Based on what the parties have represented to me, this is not the case of a union standing with a gun to an employer's head, so that the Court is being requested to lift the pressure and let the marketplace return to normalcy. Rather, the Court is being asked to supply the pressure.

Now, it may well be—I do not now decide. I don't have to decide it now, although I'll probably get into it before I'm done. Maybe under the Allen Bradley doctrine there was an improper concert between the employer and the union and there is some antitrust violation. But there are ways to litigate that.

It may well be because of the Allen Bradley doctrine that the notion of an antitrust violation is interwoven with what is or is not an unfair labor practice. But in the context of this dispute, the answer to that question is so sensitive and so difficult, so close, that for a Court to sit back and simply sign an order dramatically altering the entire relationships before it does not, at least to this Court, make any sense at all.

In the end, what is an unfair labor practice or not in this business is a pure matter of law. While no one stands before me in my respect for the expertise of the [104] Board, matters of law have, under Article III of the United States Constitution, been confided to the hands of the judiciary as its ultimate exponent. Matters of labor law, matters of antitrust law, included.

In the context of this dispute, for me simply to grant an injunction because the Board has made a nonfrivolous argument I think would be to make grotesque what the Third Circuit was attempting to do. It is one thing to dump a pail of water on a burning fire. It is quite another thing to burn the house down because somebody runs in and says not unsubstantially and not frivolously that a back fire is needed.

I wish I had more time to formally organize all my thinking. This is the best I can do under the circumstances. So I don't think the two Circuit cases which my attention has been directed to control this situation, both because there is no emergency, nothing like it or close to it; no labor unrest. Second, because I think I'm being really asked to alter the status quo rather than to preserve and to protect it, and because of grave doubts as of this moment whether it is really justiciable under 10(1).

So the record shall be complete, to the extent—in honesty, I must say I cannot say that the Board's argument is frivolous or insubstantial. Quite the contrary, their arguments are weighty, considerable and substantial.

[105] This is a serious problem in which everybody must surely understand technological advances have created certain dramatic shifts in the way the work has been or could be divided.

In part, the question turns on whether there is going to be—I call it a middleman or middle industry created in the partial containerization. If this were a typical injunction application under, I think it is Rule 65, where I had to weigh the merits, then, of course, without any res judicata effect I say now, because I haven't had a full hearing and there hasn't been a full factual recitation, I would say the merits are not with the Petitioner. That is to say, it may be more desirable from a societal sense that the efforts of the Union, to preserve this work, not succeed. It may be more costly to the community, their work rules and what they do. But, as I could not say that the Board was acting frivolously or insubstantially, I cannot honestly say that their efforts here are not aimed at preserving work. Always historically there is.

The loading and off-loading of ships have gone on by these men long before there were containers. Containerization merely was a packaging in a different way. The accommodation between employer and employee, the employer as to whom those containers belong, as to how those containers will be treated, appurtenances as they are to the ships, [106] themselves, for they not only travel on those ships, they apparently belong to the ships. One could imagine, I suppose, in a kind of a comic strip way some technological advance which would make an entire ship

capable of being taken and put on a railroad car. Would that not be a prime concern to those who originally offloaded it? Would they be forced to watch their jobs simply be extinguished by the next technological advance without any right to bargain over what role they were to play in the future?

I think that for better or for worse—mind you, I do not say it isn't better from a societal point that these advances not go forward without having to have firemen on electric trains. Nonetheless, the issue is hardly unrelated to the preservation of work.

I'm not persuaded on the merits that an effort by the Union in negotiations with an employer to preserve work under those circumstances amounts to an antitrust violation or a unfair labor practice. But, of course, that decision is not for me now and probably not later.

So far as the allegation that the Court lacks jurisdiction, I know of no doctrine that says that the plaintiff can't file as many lawsuits as the plaintiff wishes, Provided there is no bar by collateral estoppel or res judicata a litigant can maintain the lawsuit in 94 Districts simultaneously and eleven Circuits.

[107] The fact that the matter has pended and may still pend before our Circuits is not to act to deprive this Court of jurisdiction.

In any event, it was the plaintiff who invoked it. You are free to uninvoke it, of course, nolle pros it and go elsewhere.

I say finally, I may well be wrong in everything I've said, but I've done the best I can. I think that this matter deserves the most careful kind of consideration by the Board, itself.

It may be at the end that you will determine that is what you want to do. If you do, it will have tremendous consequences, perhaps, under the collateral estoppel doctrine, what-have-you, in terms of antitrust consequences for the Union and employer, for apparently there is no good faith exemption, is there? I don't think so.

Mr. Fitzsimmons: To an unfair labor practice, your Honor?

The Court: No. To an antitrust action.

Mr. Fitzsimmons: I won't speak on antitrust.

The Court: But this is an extremely complicated matter. Not just because of the history of it, but because the ramifications of it go every which way.

I don't think that this Circuit, the United States Court of Appeals for the Third Circuit would want me to sign an [108] order on such shifting sands as these. I won't do it.

Application for Temporary Restraining Order is denied.

I don't want to interfere with your right to appeal. You can't appeal a TRO declination.

Is there anything else that you would present by way of—should we not consolidate this into a preliminary injunction in some way so that you might be able to get immediate review?

Mr. Fitzsimmons: Do I understand your Honor's ruling to be a matter—I understand your Honor's ruling. You have accepted that we would—we have presented to you a legal theory that is substantial and not frivolous; that your Honor has taken there is irreparable injury to the parties.

The Court: I've assumed it for the sake—I have little problem with that. You know, sitting in the background there were all these antitrust treble damage suits. I don't know why money won't satisfy them.

Mr. Fitzsimmons: We would have—I anticipate—the Board is prepared to say to your Honor if your Honor is going to have a hearing on the preliminary injunction that, in effect, if you bifurcated it that we be allowed to present to you on the right to control theory which would probably only take a day or two of hearings. And then at that point, [109] perhaps, the parties could decide whether they wished to present the additional evidence or not, depending on your Honor's ruling.

The work acquisition theory, my recollection is the trial—

The Court: I would not find—I tell you, if what you are looking for is a finding that your theory is not insubstantial and not frivolous, how could I honestly say anything other than that?

Mr. Fitzsimmons: Is your Honor saying, given your Honor's ruling today, that your Honor would rule against us on a preliminary injunction, in any event? In effect, denial is the denial of a preliminary injunction?

The Court: I want to do that for you if I humanly can. It may make me a little more vulnerable. I think you deserve to have review at the earliest possible time. I want to find the way to do that for you if I can.

Mr. Fitzsimmons: Can I have one moment, your Honor?

The Court: Sure.

(There is a pause in the proceedings.)

Mr. Fitzsimmons: The only problem I have, your Honor, is the factual—assuming that the Circuit Court of Appeals finds your Honor's ruling is in error, I don't want to have to come back and then do a hearing.

[110] The Court: I'd rather not have to do a hearing if they're going to find that I'm not. Ha, ha, ha, ha. If they

will agree with me, I'd rather not—listen, if they agree with you, you're going to get your injunction.

Mr. Fitzsimmons: I take it the parties—

The Court: That is pretty clear.

Mr. Fitzsimmons: As to the facts—there is reasonable cause to believe the facts exist.

The Court: I don't know what you need a hearing about, frankly. I mean, really.

Mr. Fitzsimmons: I've got to present you with some facts to say there is reasonable cause to believe the facts, as we proposed them, exist.

The Court: Maybe you can get a stipulation of fact to save both parties some trouble.

Mr. Lambos: We have no problem with that, your Honor.

The Court: If you don't get too pejorative on either side. I'm sure there is a wide range you could legitimately agree on that would raise the issues.

Mr. Fitzsimmons: The only stipulation is there is reasonable cause. I don't think there will be any problem.

The Court: He may not agree that he could stipulate there is reasonable cause. I'm finding that. I can't sit here and say they have no reasonable grounds. I'd be [111] saying all these courts were a lunacy, lunatics. That would be ridiculous. I can't do that.

I honestly think they are not motivated by ill will. They are not wild. Reasonable people can certainly disagree about this. Isn't that the test of non-frivolous?

I'm not going to—in a case like this, without an emergency, I'm not going to simply sign injunctions because the present counsel to the Board thinks I ought to. And, then, mind you, even if the Board agreed with them, why the judiciary could throw it out without giving any defer-

ence at all to their legal opinion. I've been told by the Board, itself.

Mr. Lips: Your Honor, with respect to the simplest issue, the right to control issue, there are certain basic facts that need to be presented, such as tariffs, such as interchange agreement Mr. Lambos brought up. Such as the bills of lading and what they mean. These are all legal documents that have some meaning.

The Court: If you feel a need for a record; is that it?

Mr. Lips: I feel a need for a record or stipulation that gets in there all these legal documents. I'm perfectly willing to sit down and try to work out a stipulation. We don't ask the Court for a hearing and move right along.

The Court: I think you're entitled to those [112] things. I'm trying to make it faster for you.

Mr. Lips: I'm certainly willing to try to do that with counsel for the other side. However, I cannot leave here today without saying once more that I think your Honor is substantially ignoring the great injury and disruption that is occurring all along the East Coast and the Gulf Port Coast effective Friday happening today.

There may not be strikes and pickets, but what there are is severe economic boycotts against a great industry here. So there is substantial injury that is going on.

The Court: Tell me something. Will there be any injury to the workers if I grant your request?

Mr. Lips: I don't think there will be any injury to them. They have been operating, as we were a few days ago up till now, for seven or eight years.

The Court: Look, I can no more agree with that statement than I can agree with your friend over there, that the Board's decision is insubstantial. Somebody is going to be hurt here.

Mr. Lips: I don't know that is true, your Honor, because, technological innovation has changed jobs and provided work to the seaports. They blatantly claim that all these jobs were lost as a result of containerization, but that is not true. The general counsel investigation hasn't established that. Other things have led to the loss of these jobs, too.

[113] What we do know is jobs are lost today because of implementation of the rules. Now maybe there will be some loss of jobs tomorrow if you issue the injunction by the ILA, but there is a guaranteed annual earnings provision that the sea carriers pay for. If you are talking about using money to compensate injury, they've already got the system set up and been paying it all along. The sea carriers are doing that as a cost of doing business, but there won't be any such financial recompense for those that are injured if the status quo is not maintained.

The Court: Look, I'll tell you, this is a very complicated thing. I think they are taking a whale of a chance in the course they are pursuing. This Union can be busted and this employer can be busted. Because if you are right on the law and you get that Board to say that what they are doing is an unfair labor practice, then, if I remember the antitrust law that I looked up a couple of years ago when I was working on this opinion in this case, and if there is no exemption for good faith for antitrust—do you know what I'm talking about?

Mr. Lips: Yes, your Honor.

The Court: Then you'll just walk in, you see, and prove your damages.

Mr. Lips: I urge you not to decide any antitrust case today.

[114] The Court: I'm not. If you—look, this is a court of equity. I have to consider the ramifications of what I'm

doing. I can't be blind to all of them, the ones, at least, I know about. Frequently we can't see very far in front of our nose. This one I know: If they insist on implementing this procedure, they are under a terrible risk, I think.

Am I right that the antitrust—there is no exemption?

Mr. Lips: There is no exemption for an unlawful labor agreement, to my knowledge. I'm not an antitrust lawyer.

Mr. Lambos: I think Judge Gibbons of the Third Circuit in the case that was appealed from your Honor's decision on the motion for partial summary judgment indicated there are exemptions. What the test is—and the Supreme Court modified Judge Gibbons' test in the antitrust area, because one of them was: Was that the most reasonable way out that the parties might have chosen? And Mr. Justice Marshall said: That isn't necessary. That was one of the reasons that they vacated the Third Circuit's decision.

So there is wide scope, your Honor, in the antitrust area.

The Court: There may be. Then again, maybe not.

Mr. Lambos: There may not be. We understand that, your Honor. We also understand that what they would like [115] to do is take a portion of this case which the Supreme Court said should not be done. The Supreme Court said you got to take the whole case. What we would be willing to stipulate, to make it quick for them, is if they would like to take an appeal from your Honor's determination, we would stipulate that on the way back, if the Third Circuit reverses your Honor's determination; that we would be enjoined from enforcing the rules on containers.

We would argue with the proposed language that was submitted to your Honor today. We have not gotten into that.

The Court: I think that is a very generous offer, don't you?

Mr. Lips: There is no possibility to stipulating the record on work preservation. It would take days and days of hearing.

Mr. Lambos: I'm not saying that.

Mr. Fitzsimmons: I take it Mr. Lambos is saying there is reasonable cause to believe the facts exist without getting specific.

Mr. Lambos: No.

The Court: He's not saying that. He's saying if they reverse my determination, there won't be any need for a second hearing before me. They'll agree to an injunction.

Mr. Lips: There is no way to get it up there, your Honor, without a full hearing, because Mr. Lambos just [116] objected to bifurcating the issues.

The Court: It is all right with me, sir. I was trying to help you to get it there faster. If you don't want to do it faster we'll get there the regular way. We'll have discovery first, have all the rules, because both sides are entitled to that.

As of right now, although I'm listening to you speak, I'm not even sure you are a party to this action. I think he's the only party.

As of right now, all we have is an application for a TRO which has been denied. That's all.

Now—

Mr. Fitzsimmons: Excuse me, your Honor. Perhaps I didn't understand Mr. Lambos. If he could explain it to me once more?

The Court: Please. I think what he said—I have a little flu. I'm trying to keep myself together.

What he's saying is: Look, if you can find some way to stipulate to enough facts that you may need—although I don't know what facts you really need. I don't know what has been judicially found from court to court around the United States—get right up to the Circuit. If the Circuit reverses me, they'll agree to an injunction. You won't have to have an evidentiary hearing later on.

Mr. Fitzsimmons: What he's really saying, then, [117] it doesn't bind him in any other litigation, because it is not an absolute finding on the merits. All he's saying is what I'm saying. If we presented our evidence there would be reasonable cause to believe it existed.

The Court: He's saying they are not so sure they would bring that particular test in these circumstances. Is that what you are saying?

Mr. Lambos: Yes.

Mr. Fitzsimmons: If that is the standard. I'm not asking him to stipulate.

The Court: He would have to agree—I think what he's saying, sub silencio, is: If they would really apply that standard here, they would reverse me.

Mr. Fitzsimmons: I'm not asking him to agree to the standard. I'm asking him to the factual stipulation.

The Court: Why, if you two guys, you two gentlemen can work up a proposed order together, denying a preliminary injunction which will have in it what is satisfactory to both of you to create the proper—frame the proper issues for appeal, if you do, I'll sign it. If, for some reason, you feel an evidentiary hearing is necessary, I don't know that I can afford you one immediately, but I will as promptly as I can.

Mr. Fitzsimmons: Could we meet tomorrow morning [118] at our office, nine o'clock?

Mr. Lambos: Certainly. Could it be at ten o'clock? I have a meeting.

Mr. Fitzsimmons: If we meet tomorrow morning at ten, we'll have something to your Honor maybe not in the morning, but in the afternoon.

The Court: Thank you. I appreciate your kindness.

Have a nice afternoon.

Mr. Lips: Thank you for hearing us.

The Court: You are a very fine lawyer and I enjoyed your argument.

Mr. Lips: I'm sorry I wasn't more persuasive.

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Appendix C—Transcript of Proceedings—January 12, 1981

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

Civil No. 81-13

WILLIAM A. PASCARELL, *et al.*,

Petitioner,

vs.

NEW YORK SHIPPING ASSOCIATION, *et al.*,

Respondents,

and

WEST GULF MARITIME ASSOCIATION, *et al.*,

Parties to the Contract.

Newark, New Jersey

January 12, 1981

Before:

THE HONORABLE HERBERT J. STERN, *U.S.D.J.*

APPEARANCES:

MICHAEL FITZSIMMONS, ESQ.,
BERNARD SUSKEWICZ, ESQ.,
JOSEPH E. MAYER, ESQ.,
Assistant General Counsel,
and
JOSEPH NORELLI, ESQ.,
Deputy Assistant General Counsel,
For the National Labor Relations Board.

LORENZ, FINN, GIARDINO & LAMBOS, ESQS. (NY),
By: CONSTANTINE P. LAMBOS, ESQ.,
and
DONATO CARUSO, ESQ.,
For New York Shipping Association.

GLEASON, LAITMAN & MATHEWS, ESQS. (NY)
By: THOMAS W. GLEASON, ESQ.,
ERNEST L. MATHEWS, ESQ.,
and
IRWIN HERSHLAG, ESQ.,
For International Longshoremen's Association and ILA Local Unions in the Newark port-area and the ILA Atlantic Coast District Council.

TAFT, STETTINIUS & HOLLISTER, ESQS. (OH)
By: J. ALAN LIPS, ESQ.,
For American Trucking Associations, Inc.

GARSON, DE MEMBER & WEINER, ESQS. (VA)
By: RAYMOND P. DE MEMBER, ESQ.,
For a Charging Party.

[2] Mr. Fitzsimmons: Good afternoon, your Honor.

As your Honor is aware, when we last appeared before this Court on January 5th, your Honor indicated to us that he would deny our request—in fact, did deny our request for a Temporary Restraining Order.

At that time, your Honor also indicated to the Board that because of your Honor's difficulty with the legal theory involved in the case, that your Honor would not grant a Temporary—excuse me—would not grant a preliminary injunction.

The Court: I don't know if I would summarize it quite that way, but I understand what you intend to say.

Mr. Fitzsimmons: In an effort to expedite our attempts for an appeal of that determination, your Honor suggested to us that we try to reach some type of stipulation that would enable the Board to take an appeal from what your Honor had defined was your standard—was the standard of judgment of the Board's legal theory of this case.

The Court: Well, is it necessary to have this peroration or preliminary peroration? Because I don't know if I agree with everything that you say.

What I was attempting to do was to say to you that I did not see an emergency, that I did not believe that the precedents in this Circuit required me simply to adhere to any view of counsel to the Board, as long as it wasn't outright [3] frivolity, where there was no emergency and where the primary thrust of the injunctive relief sought on a temporary or emergent basis was, at least in my view, to change the status quo and to force, really, two prospective employers to deal with each other, and for a lot of other reasons that I put on the record.

What I did offer to you was to try to find a way, since—for review, since the denial of a TRO is not reviewable. At least I don't think it is. Maybe you can mandamus me if you think that I'm all the way wrong. I suppose you can seek a mandamus. I don't know. I don't usually research those things, because I'm not concerned with them.

It was really my interest in getting prompt review for your position that caused me to suggest wasn't there some way that we could telescope this into a preliminary injunctive request. And, if you could, I had envisioned—when were we together last?

Mr. Fitzsimmons: I'm sorry, your Honor?

The Court: When were we together last?

Mr. Fitzsimmons: Last Monday, January 5th, your Honor.

The Court: I thought I would sign that day or maybe the next morning and you would be on your way to the Circuit. Your friend, over there, suggests you need an [4] evidentiary hearing with lots of factual material developed in the record, to begin with. I don't know if he maintained that position throughout. At least I remember him saying that at an earlier point. But that's a time burner-upper. And if it really is an emergency, I thought, well, in a way, we could telescope that for your benefit, because, obviously, the other side is in status quo. You're the ones who have been denied the relief you want.

Mr. Fitzsimmons: I think the problem we've had, your Honor, is that the case is obviously, as your Honor is aware, one that is complex factually. It is also a case, in light of the Supreme Court decision, that the law is unclear. It makes it very difficult for the parties to reach factual agreements.

The Court: Here is another avenue that might be of assistance.

Mr. Fitzsimmons: I'm sorry, your Honor. I'm having difficulty hearing you.

The Court: I'm sorry. I had a motion day today. Maybe I'm a little horse.

Here is another way of approaching which might be of help, if it can be done. Is there any way of isolating the controlling issue of law here in this case which I could then certify to the Circuit?

Mr. Fitzsimmons: May I have a moment, your Honor?

[5] The Court: Surely.

(There is a pause in the proceedings.)

Mr. Fitzsimmons: Your Honor, the problem is, if your Honor was correct in the standard, that will end the case. But if your Honor was incorrect in the standard, that will simply get us back here for a hearing, which I don't think —we won't have really taken a step forward.

The Court: I see. It was not my intention to certify the legal issue of what standard to apply on a TRO. What I was thinking of was what is the legal standard on a preliminary injunction hearing? Not merely the legal standard of what my role is vis-a-vis the Board's. The Board is the Board. What legal principle is the Court to apply to this case given the history?

If, in the end, what you hunger for here, what you really want, is an evidentiary hearing in which both sides will come in with all of this material. I suppose that is what you should have. I'm not trying to stop you from that. I'm really trying to help the parties by seeing if we can't cut the Gordian knot here.

Mr. Fitzsimmons: That is our hope, as well, your Honor. We have no desire to lengthen this proceeding any more than it has to be. Our problem is that we need some— the legal theory—the arguments of law are no problem. They can simply be made to the Circuit Court.

[6] The problem is the facts. We need a factual basis on which the Circuit Court can apprise—can appraise our theories. And without that—

The Court: As you see it—maybe let's get right into it. Maybe I can be of some help this way.

As you see it, what divides you—

Mr. Fitzsimmons: I'm sorry, your Honor. I can't hear you.

The Court: What divides you from your adversary?

Mr. Fitzsimmons: The facts.

The Court: You're in agreement on the law.

Mr. Fitzsimmons: We are in agreement to disagree on the law, I think. We say the standard is substantial and not frivolous. They disagree.

The Court: That is a TRO standard.

Mr. Fitzsimmons: I think they—we say that is the standard for preliminary injunction. They disagree on that as well, as I understand it. We say our theories are substantial and not frivolous. We disagree.

The Court: That is for preliminary injunction. That is the standard which I am to use now.

What about the legal principles which the Board is to apply which I am then to review, whether under a standard of not frivolous or some other standard? Is there agreement as to that?

[7] Mr. Fitzsimmons: The issues are clarified. Of course, the parties are at opposite streams regarding that.

The Court: But both have identified what they are?

Mr. Fitzsimmons: Yes. I think we have, your Honor.

The Court: So we can isolate out those questions of law; right?

Mr. Fitzsimmons: I think we could.

The Court: You could present them to me and I could decide them. Then we can certify them, if required.

What factual disputes are there?

Mr. Fitzsimmons: They are virtually infinite. There are so many facts involved in this case. The factual underpinnings of all our theories, I would say, are challenged by the Respondent.

The Court: In other words, the basic question of whether this is work preservation or work acquisition is a factual dispute—

Mr. Fitzsimmons: That's correct.

The Court: —dependent on the history of what they've done, so forth, so on?

Mr. Fitzsimmons: That's correct. Depending on large amounts of history in that regard. Also, the right of control test is my understanding is also just a factual basis [8] of that, is also disputed by the Respondents.

The Court: Okay. Now, it is plain to me—but I may be wrong. There are a lot of things I think plain are not so plain—that the factual part of this case will take a long, long time. Isn't that right?

Mr. Fitzsimmons: I think that's one of the few things we'll agree on, your Honor.

The Court: Would we both agree, would we all agree that if I am to apply your view of the burden of proof—because that is what I think we are talking about, the burden of proof, here—in the frivolous—non-frivolous business. That is the burden of proof; right?

Mr. Fitzsimmons: That's the legal standard. The burden of proof on evidentiary matters is that we have reasonable cause to believe that the facts exist.

The Court: On the legal basis it will be that it is not frivolous.

Mr. Fitzsimmons: That's correct.

The Court: If that, in fact, is the standard, then the evidentiary hearing and the legal arguments would be quite a lot shorter, wouldn't they, than if your friend's view were the correct one?

Mr. Fitzsimmons: I don't think so, your Honor. Maybe I'm wrong.

The Court: Would I have to hear the whole thing [9] de novo if you were right, or would I simply have to review whatever factual material was submitted to and your findings and conclusions?

Mr. Fitzsimmons: It is our contention the latter, your Honor. But I couldn't honestly say—in fact, I would believe Mr. Lambos would disagree with me in that regard.

The Court: You mean your adversary. Yes. I understand that, because he says it's a different standard. I think I'm rowing against the stream.

Mr. Fitzsimmons: I don't want to speak for him. I think he would disagree with me under the standard.

The Court: Of course he disagrees with you under the standard. Isn't the issue one which we could get some help on right now?

What I'm trying to say is if you are right, then my role here should be a very minimal one. Isn't that correct?

Mr. Fitzsimmons: That's correct, your Honor.

The Court: I shouldn't really have to go through a de novo, or it shouldn't be permissible for me to go through a de novo evidentiary hearing in which I hear witnesses and consider, and so forth, so on. Isn't that right? I would simply review what you have done.

Mr. Fitzsimmons: That's correct, your Honor. The Circuit Court has indicated in the case of Eisenberg versus [10] Hartzman that a trial by Affidavit in these matters may very well be the right way.

The Court: Your adversary disagrees with that. Isn't that correct?

Mr. Lambos: That's correct, your Honor.

The Court: Isn't that the question that should be certified to the Court of Appeals? What I'm trying to say is this: I think your adversary has the better of it in this kind of case. I may be wrong. Reasonable people can certainly differ. It certainly is a controlling issue which will certainly affect the outcome of the litigation, because, if you are right, then probably my function here is of a very

minimal nature. I merely look at what you have done, decide if it is reasonable, not frivolous in law, reasonable factual conclusions, a thing which I may do by submission, I suppose, as you indicate, and it is over.

If they are right, then I ought to have a full evidentiary hearing.

Mr. Fitzsimmons: What I would propose, your Honor —it may shorten the proceeding—that submission of Affidavits right now, and then go up on that rather than have to figure out the standard, then come back and then do the Affidavit submission.

The Court: Are you in agreement to doing it that way?

[11] Mr. Lambos: No, your Honor. I pointed out exactly why we would not want to do it that way.

We had offered early, very early in the discussions that we had, a question of certifying questions of law, because we think there are some very important and basic issues that should be certified to the Board. We also are anxious that there be a quietude in the marketplace, so to speak. Therefore, we'd like to have a determination by the Third Circuit, as well. We totally disagree with the Third Circuit in some instances, although we can understand when their standard under certain facts might be applicable. We think those issues should be also urged.

We have suggested that we seek to stipulate a record that may go up, that might not make necessary fighting all of the facts, because I think much of what your Honor has said is absolutely essential here.

Number one, these are not issues of law—of fact. The issues of fact are goig to be found and determined in some other forum and then reviewed by a Court of Appeals when some party or party complains that the Labor Board has not properly done it. We think that the certification deals

and revolves around the question of frivolity and insubstantiality whether or not, even if that is the correct standard, there is a second possible question for certification, whether this Court is required under that test to enter a preliminary [12] injunction when this Court feels that, on the facts presented to it, that it is not just and proper that a preliminary injunction be entered, because it would have the cause of altering the status quo, as your Honor found, and because no emergency or strike situation is before the Court.

The very issues that your Honor set forth in his opinion of January 5th, 1981. We think a certification would get us right before the Court. It might well be that the Third Circuit Court of Appeals might determine that your Honor was in error and that an injunction should issue and that would be the end of it.

On the other hand, your Honor might be instructed by the Court in some middle position, or, on the other hand, your Honor might be told that you were right in the circumstances on this case.

The Court: Let me see if I understand you correctly. The trouble is you always come over here with about five minutes' notice to me.

Mr. Lambos: I'm sorry.

The Court: I never have any chance to know. Ultimately, it is not for this Court to determine the facts—that's true, isn't it—absent some sort of a temporary restraint that you feel?

Mr. Fitzsimmons: Yes, your Honor.

The Court: You would determine this in the Board. [13] Then you would be reviewed in the Circuit Court of Appeals; is the right? The Court of Appeals?

Mr. Fitzsimmons: I'm sorry, your Honor. I have a cold today. I'm having a little difficulty hearing you.

The Court: It is all right. I'm failing somehow. I'm trying to do better.

Absent your felt need for a restraint, preliminary to the Board's opinion or rule—right?—

Mr. Fitzsimmons: Yes, your Honor.

The Court: —the District Court would never be involved in this; right?

Mr. Fitzsimmons: That's correct, your Honor.

The Court: You would go from the Board to the Court of Appeals?

Mr. Fitzsimmons: That's correct.

The Court: The standard there would be what?

Mr. Fitzsimmons: That the Board's finding be supported by substantial evidence and that, given due deference to the Board's—the Board as the primary interpreter of the Act, that the Board must be correct in its finding.

The Court: As a matter of law?

Mr. Fitzsimmons: As a matter of law.

The Court: It is only because you feel the need [14] for a preliminary restraint—right?—

Mr. Fitzsimmons: Yes.

The Court: —that you come here?

Mr. Fitzsimmons: That's correct.

The Court: Now, help me.

Suppose your Board issued its opinion, and, pending review by the Third Circuit, you wanted to change the status quo. Would you come here, too? Is there any procedure for that?

Mr. Fitzsimmons: I don't understand the question. The only preliminary injunction is that the Board seeks—under Section 10(l), the general counsel is required to seek

as soon as he issues the Complaint, as soon as he finds reasonable cause—

The Court: In other words, there is no such thing as waiting until later in the proceedings and then going in?

Mr. Fitzsimmons: The only other type of injunction that I'm aware of is the Court, after the Board issues its order, the Court may seek an injunction from a Circuit Court of Appeals under Section 10(e) of the Act. That is very unusual.

The Court: The Board makes—

Mr. Fitzsimmons: Yes.

The Court: I'm trying, really, to understand again.

So the only time the District Court gets involved [15] is when the Board, which has something under consideration, wishes to come in for an emergency temporary relief. Isn't that right?

Mr. Fitzsimmons: That's correct, your Honor.

The Court: All you can be talking about in that instance is either a TRO or a preliminary injunction; right?

Mr. Fitzsimmons: It's a preliminary injunction. The TRO is a facet of the statute, as well.

The Court: The preliminary injunction is governed by 10(l), is it?

Mr. Fitzsimmons: That's correct, your Honor. As is the TRO.

The Court: Do you have 10(l) with you, then? Let me just see it.

Mr. Lips: If I may approach the Bench?

The Court: Please do.

(Document handed to the Court.)

The Court: I see that is wrong. You're the charging party, are you?

Mr. Lips: American Trucking Association is one of the charging parties, your Honor.

The Court: So you do have the right to appear?

Mr. Lips: Yes, sir.

The Court: All right. Thank you.

I'm sorry. Did you want to say something?

[16] Mr. DeMember: Excuse me, your Honor. I'm Raymond DeMember, also an attorney for a charging party.

The Court: All right. You are welcome, too.

Mr. Fitzsimmons: While we are doing introductions, there is Mr. Joseph Morelli and Mr. Joseph Mayer, from the General Counsel's office in Washington.

Mr. Mayer: Your Honor, I'm the Assistant General Counsel for Injunction Litigation. And, if I might, I would like to make a few remarks, if I could, and help out a little bit.

The Court: Sure.

Mr. Mayer: There are two things that we have to remember in this proceeding. The first thing is that, under Section 10(1) of the Act, the General Counsel has no option but to seek injunctive relief.

Whenever a charge alleging this kind of violation, a violation of 8(e) of the Act or a violation of Section 8(b)(4) of the Act is found to have merit, the General Counsel must come forth for injunctive relief.

The Court: You say, "is found to have merit"?

Mr. Mayer: The General Counsel finds there is merit. That is an original determination by the General Counsel. It is not a determination by the Board. It is not binding on anybody. However, once the General Counsel investigates a charge of that nature, Congress has made it [17] mandatory for the General Counsel to seek injunctive relief.

The Court: That's where we are now.

Mr. Mayer: Yes.

The Court: Could you stop for a moment?

Mr. Mayer: Sure.

The Court: Let me see if I understand what you just said. You used the word "merit." Could you possibly define that a little better for me? Does that mean that you have reached a conclusion that the charting party is right, or does that mean something less than that. What does that mean?

Mr. Mayer: What that means, your Honor, is that the General Counsel feels there is sufficient merit to the charge to warrant the issuance of a Complaint.

Now, that is a reasonable cause finding.

The Court: Oh. I'm happy you said that. Now you are really helping me.

So it is a probable cause finding.

Mr. Mayer: It is a finding there is sufficient merit to the charge to bring the Complaint before the Board, to issue a Complaint.

The Court: What is the standard for the issuance of a Complaint?

Mr. Mayer: That the General Counsel feels that the charge has merit. His preliminary determination creates in the [18] mind of the General Counsel the belief that the charge has merit.

The Court: Is that like a probable cause standard?

Mr. Mayer: I suppose you could equate it to—I wouldn't say probable cause. Try reasonable cause.

The Court: If you look—you are more comfortable with reasonable cause?

Mr. Mayer: I certainly am, your Honor.

The Court: I think you'll find they mean the same. All

right. Reasonable cause. I hope you don't mind me asking you these questions.

Mr. Mayer: Not at all. That's why I'm here, your Honor.

The Court: Now, if you find reasonable cause, then you are required by law, if I understand what you are saying, to come in for a 10(1) injunction in certain sorts of cases such as this. In other words, where the charging party comes under one of the sections mentioned in 10(1)?

Mr. Mayer: Where the violation alleged is one of the nature that falls within Section 10(1).

The Court: In other words, I didn't say it correctly. Where the charging party makes his charge under one of those enumerated statutes and you have found reasonable cause—

[19] Mr. Mayer: That's right.

The Court: —you must come in?

Mr. Mayer: Where the investigation reveals there is merit to the charge. I don't know quite how else to say that. Since the General Counsel, himself, does not determine whether there is a violation or not, he acts on the basis of his determination that there is.

Now, that doesn't mean that there is a violation. The Board determines that. But it does mean that the General Counsel has determined that the case has sufficient merit to place it before the Board.

You can't cut that too fine, your Honor. I think that's about as close as you can get.

The Court: The reason—do you see why I'm asking these questions?

Mr. Mayer: I certainly do, your Honor. I can see your concern. The fact is, though, that the reason that Section 10(1) was placed in the Act—and the 1947 amendments to the Act and the legislative history make clear that Con-

gress was concerned that certain kinds of conduct on behalf of unions, by unions, such as the secondary boycott and the unlawful agreement to engage in secondary boycott—which is what Section (a) is—and certain kinds of picketing conduct, all create such a danger to the interruption of commerce that injunctive relief should be granted immediately, [20] pending the Board's determination whether there is actually a violation.

The Court: Now, would you say that this is an allegation of a secondary boycott?

Mr. Mayer: It certainly is , your Honor. It is both a secondary boycott through the normal techniques of a threat of a secondary boycott, a threat of pressure being placed against neutral employers, and it also is an agreement embodying a secondary agreement.

An 8(e) agreement is an agreement to engage in a secondary boycott. That is what you are faced with. If the charge is correct, you are faced with an active secondary boycott by virtue of an agreement between a union and an employer association not to do business with certain other persons because the union has a dispute with those other persons.

The Court: But this union claims it has no dispute, I take it, with those other persons? It claims that it has a dispute with its own employer concerning the farming out of work done for the employer.

Mr. Mayer: That is essentially what they are alleging, your Honor. Of course, the position of the charging party is that is not what is happening, but that what is happening is that the union has agreed with the employer that the employer shall cease doing business with those other [21] employers who are doing that work with employees other than union members.

The Court: Actually, to be fair about it, they aren't even doing that, are they? They are saying, "You can do business with them, but then we get to do some more work, too." Right?

Mr. Mayer: You don't need a total cessation of business. It's an attempt to alter the meaning.

The Court: To be fair about the way it is cast, they don't say you can't do business with them?

Mr. Mayer: Well, what the ultimate implication of the agreement is, is they will cease to do business with them because they will refuse to permit them to use the containers. And without the containers those primary employers, the employers with whom the union really has the dispute, are unable to do business. And that is the ultimate consequence of this secondary boycott.

Now, the fact that there is no picketing, your Honor, really does not minimize the impact of the agreement and of the boycott. If we are correct that this is an unlawful secondary boycott, by permitting it to continue while the Board hears an enormous case and while the hearing goes on and the Administrative Law Judges make their decisions and the Board makes their decision, a lot of people are going to be very seriously damaged, and many of them may be put out of [22] business irrevocably.

There is no remedy for that. It is because of that possibility that exists in every secondary boycott and every 8(e) agreement that Section 10(1) was placed in the Act. That is why it is, as you pointed out, not your obligation to determine the facts. It is not your obligation to have an entire hearing on the entire matter and make findings of fact and make credibility resolutions.

The Court: I just read 10(1) again, courtesy of our friend. Before we get to the gloss which has been put over

it by different circuits, and, particularly, the Third Circuit, 10(1), first of all, doesn't quite read the way you speak. With all respect to you, it says, first of all, that the Judge must find irreparable harm. Isn't that true?

Mr. Mayer: No, your Honor. That is for the granting of a Temporary Restraining Order only.

The Court: What?

Mr. Mayer: That's only for the granting of a Temporary Restraining Order.

The Court: That's all I was asked to do—

Mr. Mayer: No. We have before you a petition for preliminary relief.

The Court: —the last time. Let's see. Maybe I'm wrong.

Mr. Mayer: I believe you are misreading it, your [23] Honor.

The Court: It is certainly possible.

It says, "Upon the filing of any such petition the District Court shall have jurisdiction to grant such injunctive relief or Temporary Restraining Order as it deems just and proper, notwithstanding any other provision of law: Provided further, that no Temporary Restraining Order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable . . ." Then it makes it only for five days, I think.

Mr. Mayer: That's correct. That's correct. But you do note that the irreparable injury refers to the granting of a Temporary Restraining Order and not to the preliminary injunction, itself.

The Court: It does say that. I mean, it uses those words.

You say that means that—for the grant of a preliminary injunction, I don't have to find any irreparable harm.

Mr. Mayer: Your Honor, the Courts have unanimously held that the Congress has already determined under Section 10(1) that violations of this nature have much potential for immediate and irreparable injury that no need of proof of that is necessary for the granting of relief.

[24] The Court: It is mighty peculiar to say you have to have irreparable harm for restraining them for five days but not indefinitely.

Mr. Mayer: That is five days without a hearing, your Honor. Without notice or hearing. I guess it is without notice. We are speaking there of, under Section 5(a), Temporary Restraining Orders without notice in a hearing.

The Court: I thought these words, "without regard or notwithstanding any other provision of law," were meant to substitute for the usual equitable considerations of Rule 65, or are they not?

Mr. Mayer: The Norris-LaGuardia, any number of different things, your Honor.

The Court: So 65 is out; right?

Mr. Mayer: 65 is out with respect to TROs, yes.

The Court: It would be in with respect to preliminary injunctions?

Mr. Mayer: It would be in with respect to preliminary injunctions within reason.

The Court: Doesn't Rule 65 require proof of irreparable harm before you grant a preliminary injunction?

Mr. Mayer: Your Honor, this is not Rule 65. 62 would apply—Rule 65 would apply with respect—I'm not even sure it would apply with respect to a TRO. This is [25] substitute for a TRO.

The Court: Forget about TROs for a minute. Doesn't Rule 65 still apply where the request is made for preliminary injunction?

Mr. Mayer: No, your Honor. It does not. That is the specific reason that Section 10(l) was placed in the statute. The Congress made that determination already; that this kind of conduct is so damaging, so inherently damaging to the public interest that irreparable injury need not be proven. It is never an element of proof in a 10(l) proceeding.

The Court: I'll just interrupt you for a minute.

Do you agree with that?

Mr. Lambos: I don't agree with that. The Courts that have looked at it have found that all of the Virginia Petroleum tests, including irreparable injury, must be looked at in determining whether or not sufficient and proper is the test.

Now, I don't think the Third Circuit has ever specifically addressed that question. At least we know of no case there. There has been a Court in Balicar—Judge Lacey, for example, said that: I got to find irreparable harm and irreparable injury. That is the test, as we understand it, under Rule 65 and the test enunciated in Virginia Petroleum, which has been followed normally by the Courts.

[26] The Court: This is very helpful to me. I hope you don't mind educating me a little bit, because—

Mr. Mayer: I would cite your Honor to Wilson versus Milk Drivers, 491 F. 2d at Page 203, an Eighth Circuit case. Arlook versus the Teamsters, 586 F. 2d at 872, a First Circuit case.

I would cite you to Squillacote versus Graphic Arts International Union at 540 F. 2d at 858. I would cite you to Danielson versus the International Organization of Masters, Mates and Pilots, 521 F. 2d at Page 751.

The Court: All right.

Mr. Mayer: I would cite you to Dowds versus International Longshoremen's Association.

I can give you a string of citations, your Honor.

The Court: Yes. We're going to need some briefs, you know.

Mr. Mayer: All right, your Honor. Fine. I can understand it. The difficulty—

The Court: That's the only reason I'm stopping you. I won't stop you from making any kind of record you want. I'll have to have—this 10(l)—I may be very simple minded about this.

Mr. Mayer: This is not an easy proceeding, your Honor.

The Court: Thank you. That's very generous of [27] you because I really feel quite unsure here, which is one of the reasons why I would be delighted to have some guidance from the Court of Appeals, if we can find a way to do it expeditiously.

As I read the bare bones of the language, here, it is committed to my discretion, my sense of justice, whether to issue an injunction. That is what the language of the statute says.

This is what concerns me based on what you have said thus far, if I may tell you exactly. You really helped me in a sense because you solidified some of my concerns.

Mr. Mayer: Let me unhelp you a little bit, if I may.

The Court: Let me tell you what my concern is. You have told me that for reasonable cause—that your office is required to issue a Complaint if you feel there is merit.

Mr. Mayer: We are required to seek injunctive relief, that's correct, if we are going to issue a Complaint.

The Court: It's the same thing.

Mr. Mayer: No. The Complaint initiates the Board pro-

ceeding and the petition, obviously, initiates the injunctive proceeding.

The Court: And you decide whether or not to issue the Complaint on the basis of merit?

Mr. Mayer: That's correct, your Honor.

[28] The Court: And, if you do issue a Complaint, you must seek the injunction.

Mr. Mayer: That is correct, your Honor.

The Court: Yes. That's what I meant.

So that you are operating under a standard of reasonable cause. You are here, in other words, to cut through to the heart of it, because you believe there is reasonable cause to the charging party's case?

Mr. Mayer: That is correct.

The Court: Now, you may not agree with this, but I believe all "reasonable cause" or "reasonable grounds" to mean is probable cause. That is the standard, usual definition of probable cause, originating, so far as I can understand it, in the opinion of Mr. Chief Justice Taft in the Carroll case. It is the earliest, and, to my knowledge, still the only definition of probable cause. Reasonable grounds to believe.

District Courts are no strangers to such a standard. We use it all the time in the issuance of search warrants, for example.

Now, if you are only operating on that kind of a standard, one of the interesting things—how you would translate that mathematically—you know, I don't think you can get three Judges or ten or twenty to give you the same mathematical translation out of that.

[29] If you doubt that, Judge Weinstein in the Eastern District wrote an excellent opinion in which he—post con-

viction—on sentencing, burdens of proof; he's having trouble with the standard. He circularized with the ten Judges of the Eastern District. He couldn't get them to agree that "more likely than not" was over 50 percent. That's true. I forget the name of the opinion.

If you are operating on reasonable cause, in all likelihood that is not more than 50 percent. It may well be less. Because there is an opinion by Justice Marshall—or, no. I think it was Justice Harlan—in a search warrant case that reasonable grounds to believe is not even 50 percent.

In any event, whatever the percentages are, if all you are operating on is a reasonable grounds to believe standard, if then you come in to me, and if the law is irrespective of the emergent nature of the condition I must, if your position is non-frivolous, grant an injunction, then I'm operating on the standard which is far less than reasonable grounds to believe.

Mr. Mayer: I don't understand how that translates, but I'll take your word for it.

The Court: Well, no matter what figure you want to assign reasonable grounds to believe, let's say you have to be persuaded 50-50 or 50-45. If that's all you are persuaded—but I'm operating on a standard that you have to [30] be completely out of the picture, really—you are dealing with—a frivolous standard is almost to say almost you have no right to speak what you speak. That's frivolous. Isn't that what frivolous means?

Mr. Mayer: I would suppose it's something like that.

The Court: Then my level of review here is nothing.

Mr. Mayer: It's very minimal, your Honor.

The Court: That is not what this statute says.

Mr. Mayer: That—you spoke of the gloss on the statute.

The Court: Right. Now I have to address that.

Mr. Mayer: The gloss on the statute is not going to make you any happier. The gloss on the statute is, in these proceedings, if there are conflicts in evidence, you are to give the General Counsel the benefit of the doubt. If there are credibility resolutions to be made, you are not to make them. You are to give the Regional Director the benefit of the doubt. If the law is unsettled, even if you don't agree with it, you are to find in favor of the General Counsel unless the General Counsel's argument is frivolous. If the General Counsel's position is within the range of rationality in a proceeding of this nature, you are to give the General Counsel the benefit of the doubt and defer to his [31] judgment.

And the reason for that is that Congress, in 1974, felt that violations of this nature are so heinous and result in such horrendous interruptions in commerce that if they were to go unimpeded pending the Board's final determination, it would be too late for you to do any good.

I think this is precisely such a case, your Honor. Here is a case where innumerable organizations, business organizations, have sprung up in the beginning of containerization, as it developed over the years, and these organizations all are in peril of going under if this contract clause is carried out.

If they can't get—if these companies cannot get the containers, they can't perform the service for which they are in business. If they can't perform the service, they are going to go out of business. They'll go out of business in a hurry.

So that is why the standard is so low. You will find it in other cases. I assume you have not yet been presented

with a petition under Section 10(j) in the Act, which you might be interested in seeing, also, which is for other violations other than Section 8(e), Section 8(b)(4)(D), which are jurisdictional disputes, and Section 8(b)(7), which is picketing.

There may be other cases that are outside those [32] violations that also may present such immediate injury to the public interest that an injunction should be rendered even before the Board has held a hearing and decided the case.

The Court: You recognize, I'm sure, that all the arguments that you have just made are traditional Rule 65 arguments?

Mr. Mayer: Your Honor, I could not say that is the case. I was not aware of that. I think perhaps the standard is even less here. I think maybe it is—

The Court: I'm not trying to trip you. All I'm trying to say to you is, really, the equitable considerations that you are addressing me to—

Mr. Mayer: These equity considerations, your Honor, are built into the statute. What I am suggesting is that the normal equity considerations do not apply in this case. The equities that are being addressed here is the public interest. It is not private harm. It's the public interest. The disruption of commerce, of the whole group of employees being put out of business. Not simply the individual employees' interest, but the public interest in maintaining the free flow of commerce.

The Court: You'll find that the public interest is the fourth factor under Rule 65, I think.

Mr. Mayer: It is where stays are being sought, I [33] know, and for injunctions pending appeal. That is the fourth and major factor.

The Court: Honestly—

Mr. Mayer: All right. I'll take your word for it, your Honor. So long as you apply the standard here, I'm perfectly happy.

The Court: All I'm trying to say to you by that is that all the arguments you are applying to me are the traditional arguments which a lawyer makes to a Judge when seeking the Judge's restraint. But it's quite one thing to make that argument to me and quite another thing to tell me, "Here is the place where you sign." Unless you can say that my assessment as a lawyer of this situation, not based on even a hearing by me, not based on even a determination by me, not even based on me hearing a witness—actually, you don't have to. True?

Mr. Mayer: Wrong. No, your Honor.

The Court: You have to hear witnesses?

Mr. Mayer: Not witnesses. You must see some evidence. That is why we are having so much trouble with a stipulation here. We feel—

The Court: Before we get down to that, what I'm trying to say to you is if you read 10(l) the way you wish to in this kind of a situation, you say to me, then, "I have made all these determinations"—as a matter of fact, you [34] can make them ex parte, can't you?

Mr. Mayer: No. We go through a full investigation.

The Court: Can you make it ex parte?

Mr. Mayer: No. I believe no. I believe the answer is no. We must investigate and we must give the Respondent an opportunity to present evidence, and we do. And, in this case, we gave them quite an opportunity.

The Court: What you are saying is even if I think this is not a secondary boycott—

Mr. Mayer: I am saying, your Honor, if we can establish that the facts we allege to exist—if we can establish there is reasonable cause to believe they exist; that is, that our presentation would be within the range of rationality, that the Board—

The Court: That's a different standard.

Mr. Mayer: —the Board could find in our favor.

The Court: I have to give an injunction even if I think you are wrong and the Board would be wrong if they did it?

Mr. Mayer: And the theory of violation is a substantial theory. It's not off the wall.

The Court: Next March I'll be sitting with the Third Circuit by designation. We do this from time to time. [35] When I'm there I don't—if I think the Board is wrong, that's the end; is that it?

Mr. Mayer: Not in review of a 10(l) proceeding. No, sir.

The Court: No. I mean when the Board reaches its final determination.

Mr. Mayer: When the Board reaches its final determination you'll be deferring to the Board's expertise. You will be overturning the Board if it abused its discretion. That is a high burden of proof, also. That's a difficult burden.

The Court: I really have tremendous difficulty, you see, almost—I may be all wrong. I understand that.

Mr. Mayer: No. I can understand your difficulty.

The Court: You know, if they want to make a Judge out of you, they ought to do it. With all respect, I'm not trying—it's my name on the injunction. If they want to give the Board the power to enjoin people, they ought to do it. They are probably afraid it goes against Article

III of the Constitution. I suppose they would have it if they set them up as Article I Courts. But they didn't set them up as Article I Courts.

So what they are doing here is taking a tribunal which is not even a court—I guess—are you—the Board [36] isn't an Article I Court, is it?

Mr. Mayer: No. so far as I know, it's a quasi—an independent regulatory agency is what it is.

The Court: Right. And they have to enforce it somewhere; see? So what they are doing is using an Article III Court to enforce it.

Mr. Mayer: That is precisely what they are doing.

The Court: But Article III guarantees to the people the independent determination of a Judge.

Mr. Mayer: That's correct.

The Court: I am given life tenure, independence. So that my discretion, right or wrong, you know, is my own.

It is one thing to set up burdens of proof. It is still another thing to say that you have to give deference in certain levels.

I think these things are quite permissible. Clear and convincing, even, you know. But when you say, as you say to me, that I have to say that you are speaking frivolously before I deny you application under the facts here, then I am performing no judicial function at all, virtually.

Mr. Mayer: Well, you must recall, your Honor, that we would be asking you to make that ruling after you have seen our evidence, at least in the form of Affidavits. If you felt that our evidence didn't rise to the level of reasonable [37] cause, if it didn't rise to the level of—

The Court: That's a different standard than frivolity, you know.

Mr. Mayer: It is reasonable cause as to the evidence and substantial legal theory.

The Court: You can read decisions.

Mr. Mayer: They are giving me the Hirsch decision, which I'm sure that you have seen. I will read it to you, for what purpose I don't know.

"Since the 10(l) proceeding is thus ancillary to the main unfair labor practice action committed to the Board's exclusive jurisdiction, the Regional Director faces a relatively insubstantial burden of proof when he petitions a District Court for temporary injunctive relief. Pursuant to Section 10(l), he need not prove that a violation of the NLR has, in fact, occurred, nor must he convince the District Court of the validity of the legal theory upon which he predicates his charge. Both questions are for the Board's determination in the first instance subject to the right of appellate review. Rather, he, the"—District Court—"need only"—"he, the Regional Director, need only demonstrate that he has reasonable cause to believe that the elements of an unfair labor practice are present and that the legal theory upon which he proceeds is substantial and not frivolous."

That's the Third Circuit's most recent [38] pronouncement on Section 10(l).

The Court: If I give you a preliminary injunction here, it can be literally years before it gets to the Circuit.

Mr. Mayer: I think not, your Honor. I think not. They'll be in the Circuit Court in a minute.

But we're not asking you to give us—

The Court: No. They'll be in a Circuit Court a minute after the Board mentions the section.

Mr. Mayer: Did you say 10(l) or 10(e)?

The Court: If I give the injunction you want today, the preliminary injunction—

Mr. Mayer: Right.

The Court: —that is the handmaiden of the Board determining process.

Mr. Mayer: That's correct.

The Court: It will take this Board a while, won't it?

Mr. Mayer: I would assume it may.

The Court: A long while.

Mr. Mayer: It may.

The Court: If the history of this case is any example, you are talking about an injunction here which could be in effect for years, is what I'm saying, before the Circuit even gets to look at the Board's determination.

[39] Mr. Mayer: Your Honor, may I point out that if the Board takes an unreasonable period of time to decide the case, the Respondents can always come back to the Court and ask for relief because of change in circumstances. We might or might no oppose it, depending upon how long the Board is taking. We would probably oppose.

But you certainly would be free to relieve them of the injunction if the Board took what would be an interminable amount of time. They always are free to do that. You are free in your judgment to relieve them of the burden of it if it does take too long.

I point out that the Board has before it right now all those cases that the Supreme Court remanded and that the various Circuit Courts have remanded to them. The Board could conceivably decide those cases on the record it has before it right now. It has asked the General Counsel for his view and the charging party and the Respon-

dents for their views. And the General Counsel suggested that the cases be remanded for further hearings.

I grant you if that is done this could take quite a period of time. But it is because of the nature of the case. This is a case that has substantial legal issues and a substantial impact on the economy and on the entire longshore and transportation industry. This is not a small case. This is a massive case.

[40] The Court: I know. But that means that any decision I make is a meaningful—what is the proper word?

Mr. Mayer: "Meaningful," I think, is.

The Court: I don't mean it that way. I mean the decision that I make is for the next years as important as the one that the Board is going to make, which could be years away.

All I'm trying to say is to decide or not to decide is to decide. Either way I would be ordering a condition. To leave it alone is to make a decision.

Mr. Mayer: That is correct, your Honor.

The Court: To change the situation as it exists at this moment is to make a decision.

Mr. Mayer: That is correct. Of course, in our view, we are not asking you to change the situation, but to restore it to the way it existed before the alleged unfair labor practices occurred. But you are quite right. This decision could be a very meaningful one. It could exist for some period of time.

The Court: Let's take a look at what is going on here for a moment. It's true that if you do not prevail many of the charging parties and others similarly situated will be damaged.

Mr. Mayer: Severely.

The Court: Let us say severely. If you do [41] prevail, are there no casualties?

Mr. Mayer: The Union will have been and the employer will have been deprived from implementing an agreement, a collective bargaining agreement.

The Court: That is not some right inchoate floating around the mount some place, is it? Will anybody be hurt? Human beings?

Mr. Mayer: I assume there would be individuals benefiting from this agreement.

The Court: There are—as you and I both, if you think about it, know, substantial numbers of people will be hurt, too?

Mr. Mayer: Your Honor, your point is well taken. I won't deny that. Your point is well taken.

As the Seventh Circuit said in the case that I cited to you earlier, the Union would be denied for a period of time its rights.

The Court: But it is not a union that you are talking about.

Mr. Mayer: The Union membership.

The Court: You are talking about people who work. That is not to say just because they are people they are entitled to anything more than the people who work for CONEX, Twin-Ex or the trucking firm. But not to recognize that on both sides of the line is injury is missing the whole [42] thing.

Mr. Mayer: I would acknowledge that, your Honor.

I would also point out that the cases have said in proceedings of this nature we don't balance the equities. We don't engage in a balancing between the injury on the one hand and the injury on the other, because it's the public interest that we are protecting.

The Court: Now, look—

Mr. Mayer: I know that's words, but that's the gloss to be placed on the statute.

The Court: I know about public interest. I really believe in the public interest. But I have heard you say to me at least five times, maybe six, about all these firms that would go out of business. I don't know what public interest there is in those firms any greater than the public interest in the stevedores who work.

Mr. Mayer: It is the interest in the free flow of commerce, your Honor.

The Court: The public has an interest in the freedom of the workingman to work and in not having to support him on welfare and not having to support him on unemployment compensation, too.

Mr. Mayer: You're quite right. I don't deny that.

The other point I would like to make is that the [43] injury that has been done to the membership of the ILA was done years ago. That sure occurred when these containers first developed. That was back in the fifties and the sixties.

What is happening now is that the ILA and the Steamship Associations are contracting to regain work that they have lost due to this containerization, this new innovation. And the Supreme Court pointed out they could have, back in the beginning, lawfully contracted between the ILA and the steamship companies not to use containers at all, not to let anybody use containers. They didn't do it.

Now, it may seem like an anomaly that they tried to engage in some sort of a balance in a compromise. They let some go. They tried to retain some. What they let go just became too big. It developed into a whole new industry. Unfortunately, they lost it. That work is gone.

The Court: Would they have been better off if they had never permitted it out? Is that it?

Mr. Mayer: For—the ILA would have been better off. I don't think it would have been better off for you, I or the nation as a whole. It's a much cheaper form of operation. But that they could have done. That would have been lawful.

The Court: In many ways your position has great allure to me. Not this position, but the other position. All [44] I have to do is to sign up with your decision.

Mr. Mayer: I don't believe you have to just sign up. I think you have to examine the case. I think you should examine it very closely before you put your name on the dotted line.

All I'm suggesting, the standard is very, very minimal. If we meet that minimal burden, then you should put your name on the line. The reason that we are having so much trouble with the stipulation here is because we can't get the minimal amount of evidence that we would need to support the violation through a stipulation.

The Court: If your view of the law is correct, then you would say I need not hold evidentiary hearings. What I would do would be to look at your factual workup, your legal conclusions, and to apply the standard.

Mr. Mayer: No. That's not quite right. We would be satisfied to submit on Affidavits, our and theirs.

The Court: But what would my function be there?

Mr. Mayer: Your function would be to determine whether, on the basis of the Affidavits supplied both by us and by the Respondents, our assertions of fact are—might be adopted, could reasonably be adopted as true, giving us the benefit of the doubt in areas of conflict, whether

we may be logically and reasonably be credited, our witnesses, our statement of facts; whether our conclusions that we derive [45] from them, including the reasonable inferences, are within the range of rationality; if they are logical, if they make sense, regardless of whether their conclusions would make as much sense; and, whether, finding the facts on that basis, making just a preliminary sort of finding of the barest kind, whether the legal analysis we argue, whether our position is a substantial argument. That is to say, in short, whether the facts as we put them forth create a reasonable basis for believing that the elements of a violation of the Act as we allege it are present, applying our legal analysis, and if our legal analysis is a substantial one and not frivolous.

The Court: You do recognize that in that construction you got all different standards operating. You say different words that mean different things legally. To say—I'm not trying to be difficult. Honestly, I'm not.

Mr. Mayer: I understand that. It's not easy to articulate this.

The Court: Because if you just say "non-frivolous," forget it. I'll sign right now. You are non-frivolous. I know enough about this case. I've had something to do with this case for years. You're not frivolous. I told them when you came in here I could never find your position to be frivolous under the circumstances of this case.

[46] Mr. Mayer: But the difficulty with it, your Honor—

The Court: As I understand frivolity, you know—

Mr. Mayer: Yes, but the difficulty with that is that your understanding of the case is based upon briefs and petitions, and not upon evidence.

The Court: I'm entitled to take judicial notice, I think,

of what the Supreme Court of the United States has written about this case of what two or three Circuit Courts have written about this case—

Mr. Mayer: Let me say this. I will give you this: That simply because the Supreme Court remanded the case back to the Board for further consideration doesn't mean in and of itself that the Board has reasonable cause to beli[illegible] a violation has occurred.

The Court: I gather it is quite the other way around, isn't it?

Mr. Mayer: They remanded it for reconsideration. The mere fact that it has been remanded for reconsideration doesn't mean applying the appropriate standard there is reasonable cause. That would be for you to determine—let me put it this way—

The Court: Good. Reasonable cause. Will you not agree that reasonable cause and lack of frivolity are not [47] synonymous.

Mr. Mayer: Well, it depends. If you are applying it—if you are applying it to the standard as set forth by the Third Circuit, the Seventh Circuit, the Eighth Circuit, I'm sorry to say non-frivolity material—a material argument, a substantial argument; not insubstantial—I don't know what phrase you want to use. If it is a substantial basis, if our argument is not off the wall, if there is some merit to it, then you should find reasonable cause exists.

The Court: Aside from the statute, I'm talking as lawyers now.

Mr. Mayer: Your role is very limited, your Honor.

The Court: It may be. And I may come to the conclusion. I really may.

Mr. Mayer: I hope you will.

The Court: I understand that, too.

All I'm trying to say is that those words don't mean the same thing in any other branch of law. Will you give me that, too?

Mr. Mayer: I could not say that. I don't know.

The Court: I tell you this—

Mr. Mayer: All right.

The Court: —any Judge who issued a warrant [48] because the cop wasn't frivolous would be reversed in a second. Reasonable grounds to believe or reasonable cause to believe, the kind they use in issuing warrants—I just picked that out—doesn't mean non-frivolous. You can't possibly be non-frivolous.

Mr. Mayer: I will even forget the non-frivolous. Just make it substantial.

The Court: It doesn't mean that.

Mr. Mayer: If the word bothers—the word seems to bother you. Forget the frivolous. It's just got to be a substantial—

The Court: I have to be concerned with the word "frivolous." You're right to use it because the Circuit used it. But they also used the word—

Mr. Mayer: "Substantial."

The Court: —"substantial."

Mr. Mayer: I'll buy that.

The Court: But I also sense that what the Circuit was concerned about, you see, a strike situation. We got to put out a fire. Maybe that is wrong.

I'll tell you what I'll do. I'll hear from your adversary and make a suggestion.

Mr. Mayer: Let me make one last point again.

The Court: Sure.

Mr. Mayer: The absence of a strike is really [49] insignificant. The fact is that the boycott is underway by

agreement. That is what Section 8(e) was put in the Act for; where a union, instead of striking, agreed with an employer that the employer would engage—

The Court: Would you say that a reasonable man could disagree with that and say it was not a boycott? Would you say it was frivolous to say it was not a boycott?

Mr. Mayer: That this was not a boycott? That would be frivolous.

That only question here is whether this boycott, which there is unquestionably engaged in here, that exists—the only question is whether it is for a preliminary purpose.

The Court: That would make it not an unlawful boycott.

Mr. Mayer: It would make it not an unlawful boycott, but it is, nonetheless, a boycott. It would be a preliminary boycott, in a sense.

The Court: Look, if you are working in a plant, just for example—I used this with your colleague over there—and somebody was sewing arms on dresses—

Mr. Mayer: I saw this in the transcript, your Honor.

The Court: Now the employer wants to send the dress out for the arms and come back for the skirt.

Mr. Mayer: Right.

[50] The Court: If the Union strikes and says no, is that a boycott in any sense of the word?

Mr. Mayer: Oh, it certainly is, your Honor. Certainly is. You are telling the employer he shouldn't do business with someone else. It's a legitimate primary purpose to restrain the work.

The Court: Somebody who said this was for a legitimate primary purpose was frivolous?

Mr. Mayer: No.

The Court: Would you say he had reasonable cause to believe it?

Mr. Mayer: I would. I would say a legitimate argument to be made that way.

The Court: So you say there is legitimate cause either way?

Mr. Mayer: I would say a substantial argument could be made on both sides. That is for the Board to decide. Not, your Honor, for you.

The Court: You may be right.

Mr. Lambos: Your Honor, I stand here, as I did last week, saying in a loud voice: We are not the neutral employers who is being pressured by the ILA. Whatever there may have been of that in 1968 ended in 1969, when we put our signature on the rules on containers and where we reached what I told the Supreme Court of the United States in my [51] argument before them was the grand compromise.

It is true the ILA wanted the whole thing. It is true, as Mr. Mayer says, that they said: We want no containers moving at all. It is true also that we say, "Hey, fellows, come on. Somewhere there is a position, and we think that you should have this much." And the ILA wanted this much. David Cole, the Presidential mediator and advisor sent by the then-President of the United States, said, "Fellows, here's what I think that you ought to have. Eighty percent for the public in the industry and 20 percent for the ILA." That 20 percent at that time has been dissipated by Federal injunctions to a point where, in the Port of Philadelphia and in New York on the meat, it is barely a percentage or two or three.

But, now, what they are seeking is to take, by the techniques of grand delay, whatever else there exists and to make the industry and thereby the public ultimately pay that large a price. Because if the solution is not the rules

on containers, that which the parties thought twelve years ago was it, then somehow there must be another solution. That solution may be the one indicated—and I hope it never is—by Mr. Mayer today. It may be a solution that the Solicitor General indicated: Have the ILA do all the trucking. A suggestion which I think is so wrong in that it prejudices—

[52] The Court: How could he accomplish that?

Mr. Lambos: A tremendous war among competing unions.

The Court: How will he do that?

Mr. Lambos: These suggestions that we get from Mr. Wallace, who argued for the Solicitor General, or Mr. Mayer, who is arguing for the Board, on how we might have done it, is something that must be cast aside, because that is not what history did. And it may well be that if someone else was sitting in 1968 that they may have done something differently. But in the determination of the Supreme Court on June 20th, 1980, they said, "That's not the test. The parties have got to do the best they can." And that's what we did.

But it is important that on July 2nd we appeared in Mr. Mayer's office, in the General Counsel's office, and said, "Fellows, whether we are right or wrong or indifferent or we should be doing something different, please do it right away."

June, July, August went by and they heeded us not. In September, right after Labor Day, we appeared with the General Counsel again, and we said, "Fellows, please. The months are going by, and here is what we're going to have to do." Well, the Board should be entitled to a reasonable amount of time. But the years that have gone by here—

[53] the fact that the Board—here it is now January the 12th. We have not heard from the Board. And, yet, Mr. Mayer's office said to the Board, "Send these cases back to seven Administrative Law Judges"—some of whom are no longer in being because, unfortunately, they passed on —"and have them take evidence again."

Now, it may be that they seriously think that is the way to do it. But we say to your Honor that the standard—

The Court: Your position is, isn't it, that a grant of a preliminary injunction here effectively determines the status quo for years?

Mr. Lambos: Exactly, your Honor. That is the position that we argue. And it will, because we know that from '73 to '78 to '79 to '80 to '81 now, the processes of the administrative law judge move extremely slowly.

As a result of the hearing here on January 5th, speaking about the equities, a lot of the people in the industry heard about the fact that this proceeding applies—

The Court: See, what disturbs me—I'll tell you. Maybe I should say it to him, because you'll like this.

Mr. Mayer: Ha, ha, ha.

The Court: What disturbs me about it is—I mean, was it Franklin who wrote, "We can not be blind as Judges to what we know of as men"? I know that if I grant an [54] injunction here it's going to take the Board a long, long time. As a matter of fact, if I grant the injunction, there will be very little reason for them to decide it promptly, for counsel will have achieved from me effectively, for however long it takes, what he could only have really achieved if he first persuades the Board, who may reject him. And even if he can persuade the Board, then persuade the Circuit or sustain it in the Circuit, which may reject it.

But if I am to do this in this field, with this complexity, with all of these attendant consequences on such a standard —which I'm not too sure yet just what it is—I'll be effectively determining the status quo of whether it is this status quo or some other status quo for a long, long time.

I suppose you would agree with me?

Mr. Caruso: Yes, your Honor. We agree with you. That is why we thought, when we first talked to them last week, that certification is the fastest way.

The Court: That is why I was going to get this thing up to the Circuit.

Mr. Caruso: The fastest way to know what standard should be—

The Court: In the end it will be the Circuit's view of whether this kind of thing—this whole case boils [55] down to work preservation and work acquisition pretty much. Right?

Mr. Mayer: Half of the case does.

The Court: Or a good percentage. You don't have to be a big genius to figure that.

The final word on that, do you know where it will be? With all respect to the Board, it's going to be in the Circuit.

Mr. Mayer: It will be the Supreme Court.

The Court: Or the Supreme Court, if they decide to take it.

But what you are doing here, you see, on the standards that you say are applicable, non-frivolous, reasonable, it's kind of a heads you win, tails you win, because no one ever hears it, really, for a long, long time. It just come down. Whether you view it as restoring the status quo or as they do, as changing the status quo, I would be creating a status quo which will be continuing thereafter for a long, long time.

If I could have some assurance that the Board would act within X time—because, as you pointed out so eloquently in your presentation to me, you have quite a bit of merit, too. These things have a life of their own after a while.

If the Union had fought to the last ditch—what? Twelve or thirteen years ago? You would say 23 years ago. [56] I don't know—that it wouldn't have even been a burgeoning industry and you wouldn't have this public interest.

On the other hand, if you get the restraint here and the burgeoning industry burgeons further, there will be more public interest. On the other hand, it winds and it dies. Other public interest. These things feed upon themselves.

What we need in this case is a determination of work acquisition or work preservation from the people who are going to make the decision, ultimately, as soon as possible. No one can move off the dime until you do that.

Mr. Mayer: Your Honor, as I suggested earlier, and I will suggest again, your concern is certainly warranted. You have a real, legitimate concern, as do the Respondents. I'm concerned about it myself, standing up here and asking you or telling you you should issue an injunction that could very well be outstanding for a very long period of time.

As I suggested earlier, you could follow the course of hearing the Respondents in this case. If the case drags on before the Board, you could hear their motion to vacate the order because of the length of the proceedings. That has been suggested by other Courts. The Eighth Circuit suggested that.

The Court: Do you have any idea when the Board will make a determination?

[57] Mr. Mayer: Your Honor, in all honesty, I'll say it in all candor. None. The fact is that the General Counsel's

position, the party's position on those cases that were remanded to the Board have been pending before the Board for some time now, and they have not acted on it. You are in a situation of transition now at the Board.

The Court: They'll be changing, too. Is that it?

Mr. Mayer: You have two members—two memberships are open right now. One, certainly. Member—who is it—Pennello is retiring. There is another member, Truesdale, who is on an interim appointment from Mr. Carter, who certainly will—we can't assume he'll be reappointed by the new administration.

As I was saying, you will have two open memberships. You'll only have a three-man Board for some period now. This is not the kind of a case that will be decided by three members. So it is very true that this case could—it could drag out.

The Court: I'm sorry. Before it goes to the Board, I gather, is it going to be worked up by more ALJs?

Mr. Mayer: The recommendation of the General Counsel and the charging parties is that more evidence is needed. They requested a remand to the Administrative Law Judges. I did tell you that before. I wasn't hiding it.

[58] The Court: I didn't mean that. I got my head to my head. I know what that means.

Mr. Mayer: The Respondents have opposed that, I believe.

Mr. Lambos: Terribly. Yes, we've screamed.

Mr. Mayer: They have opposed.

The Court: They may unoppose it, if they can't get an injunction.

Mr. Mayer: That's a very good possibility.

The Court: You see, that's the real nub of it. That's what's really eating at me. You know, maybe the Board

would have thought—wouldn't think they'd need evidence if they couldn't get an injunction.

Mr. Mayer: Could we go off the record?

The Court: Any objection?

Mr. Lambos: No.

(Discussion off the record.)

The Court: It seems to me that I have to make a decision, first of all, on the legal standard applicable, the standard of review, the burden of proof, or whatever the proper term is, that the Court must use in evaluating the application of the Board for a preliminary injunction. I gather we're beyond the TRO stage. Sooner or later we have to be at a preliminary injunction. Would you agree with that?

[59] Mr. Mayer: I do.

The Court: The Board claims—we've been through that. We understand that.

I gather the Respondents—maybe I haven't heard you, really. What do you claim? You use the standard of Rule 65?

Mr. Lambos: Yes, your Honor. On preliminary injunction it is our position that all the standards and tests of Rule 65 together with the decisions thereunder, the Virginia Petroleum test, and so forth, must be looked at by the Court in determining the proper meaning and effect of just and proper, et cetera.

The Court: Okay. So that's the legal break point right there.

Would you agree—you may not—would you agree that if the Board's view of the law was correct that their position is not insubstantial on the facts? That is to say, not frivolous, or would you claim that it failed—I'm now reach-

ing the second thing, which is, of course, the facts. Would you claim that their factual posture fails of their own test?

Mr. Lambos: I would suggest the latter, your Honor; that the Board would fail even that test. But we are willing to say that we might assume for the purposes—for present purposes that the Board is not frivolous or [60] insubstantial, and that the Court must—

The Court: And the Court should grant it, and you would go up on that basis to test the legal posture of Item 1; is that it?

Mr. Lambos: No. Your Honor, what we are saying is—I'd like to get back to what our offer had been to the Board the other day. Let us certify a question for the Court of Appeals which would say, in effect, "Assuming that the legal theory of the Board is not frivolous nor insubstantial, may the District Court, nevertheless, deny the preliminary injunction if it determines that the issuance of the preliminary injunction is not just and proper?"

The Court: Isn't that an excellent form. What is wrong with that?

Mr. Mayer: Well, your Honor—

The Court: You would claim—if I understand your position—stand up or sit down, whatever you want.

The part that says, "just and proper," you would say it's always just and proper if it is non-frivolous and not insubstantial?

Mr. Mayer: If we have established there is a secondary boycott in progress, it is just and proper to terminate, pending the Board's ruling.

The Court: Please.

Mr. Mayer: That is where we run into our problems, [61] your Honor. We have to have evidence that the conduct is occurring.

The Court: I'm willing to assume—more than assume. I'll take a look at it and verify my assumption. I told you from the first day that I could never say that your position in this case is insubstantial or unreasonable.

Mr. Mayer: Your Honor, if you will pardon me—

The Court: I'll be willing to say it again after I review the Affidavits and conclusions, so forth.

Mr. Mayer: Fine. That's what we ask you to do. If you do that, and you then say that you find either that we didn't meet the standard or that the standard is other than that which—

The Court: Yes.

Mr. Mayer: —or if you find even if we met it, that injunctive relief is not just and proper, with the record we could take it up on appeal.

The Court: All right. I see now what must be done to give everybody the expedited hearing that everybody deserves and wants.

I will decide both questions, and then there will be an appeal taken by one side or the other, for a denial of the preliminary injunction is appealable by you and the granting of it is appealable by you. I will need a little help. I'll need some briefs. I will want briefed the legal question [62] whether or not the considerations of Rule 65 apply in any way, in any part, to an application for a 10(l) injunction.

Among the issues to be addressed, I would like to know whether, in the view of the parties, the words "just and proper," referring to the discretion of the District Court, are to be equated in all instances to mean nothing more than the Board is making—rather, counsel for the Board is making a non-frivolous and non-insubstantial and non-

unreasonable application in a case which it says is a borderline case.

Mr. Mayer: Excuse me. Did I get you right? You said "just and proper," or did you mean "reasonable cause"?

The Court: I'm referring to the standard under which 10(l) speaks to the District Judge. It says "Upon the filing of any such petition the District Court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper."

So the statute says to me I should do what seems to me to be just and proper. What you are saying to me is, if I understand you correctly, in these situations what is just and proper for me to do in all cases is to do what you tell me to do or ask me to do, providing you are not acting in a frivolous or insubstantial way. Is that not true?

Mr. Mayer: That's correct, your Honor.

[63] The Court: That's the issue I need to have briefed. I wish you also—let me go off the record for just a minute.

(Discussion off the record.)

The Court: Back on the record.

That seems to be the nub of the legal issue. If there are any others, suggest them.

As a second part, I would say submit to me the body of material upon which you would ask me to make my determination. I will both announce what I believe the appropriate standard is in a case such as this one, and, as applying it to what you have given me, decide it.

Mr. Mayer: Did you want, also—

The Court: I'm sorry.

Mr. Mayer: Do you want, also, a brief on the merits? That is, on the merits of the alleged violation?

The Court: That would be on the second aspect. The second aspect would be your factual and legal presentation, which is to be judged either under the standard which you say or the standard under which your adversary says.

Now—I'm sorry.

Mr. Lips: Excuse me, your Honor. Do you mean that to be the record of fact in the case upon which you base your decision? Is that what you mean?

The Court: I'm afraid—I may not use the right [64] words. What I'm trying to say is whatever it is that I'm to judge by the standard which they say I am to judge it, give it to me at the same time. Fact and law. I'm merely breaking in two. The one thing is the standard for me to apply, and the other thing—

Mr. Lips: I understand. I simply suggest as a matter of procedure I'm unaware of any facility of the Court or ability of the Court to accept evidence except in its traditional form. That is, some form has to be given to it to state: This is the evidence upon which the General Counsel bases its position.

The Court: He wants to give me Affidavits, and so forth.

Mr. Lips: That's correct.

The Court: If you are worried about their right to confront it—

Mr. Lips: No, sir. I'm just worried that it becomes a part of the record of this proceeding—

The Court: Of course it does.

Mr. Lips: —upon which we base our appeal.

The Court: Certainly it would. You do or don't want it?

Mr. Lips: I want it to be—

The Court: Of course. Anything you give me is a part of the record. You'd file it.

[65] Mr. Lips: Fine.

Mr. Lambos: I take it, your Honor, we would have an opportunity to respond to it?

The Court: Yes. This is a two-way street.

Do you claim the right to introduce evidence before me?

Mr. Lambos: Yes, your Honor.

The Court: You claim they have no right to introduce evidence before me?

Mr. Mayer: I do not claim they have no right at all. Our position simply is that it should be submitted on Affidavits. We don't need live testimony, because you're not to make credibility resolutions, in any event.

The Court: You better tuck that into Point 1. That is to say, if the Board is correct, clearly, if you are not correct, and there is more scope here than you would give us, then we would have to hear evidence. I think you'd agree to that.

Mr. Mayer: If credibility resolutions had to be made, yes, your Honor.

The Court: Then make a subpoint, too. Do credibility resolutions have to be made?

You are all good lawyers. You see the issues here.

Mr. Lambos: I think we'll have another subpoint, if [66] your Honor does not mind. At least in our presentation indicating what we think it is incumbent upon the Court to hear from us before it makes a determination. What is the minimal amount of evidence that—

The Court: Yes. Then I think that a decision, as long as it covers Point 1—I mean, the first area, whatever it does on the second, one way or the other, will certainly provide a basis for review either by its own weight or by certification. If I fully agree with the Board, that's easy.

Even if there is some area we don't even anticipate now, since Point 1 will have to be answered, then it will go up.

All right. What is reasonable for a timetable? What is the reasonable order of briefing, simultaneous briefings and rights of reply?

Mr. Lambos: We would prefer to respond to the Board.

First of all, we don't know what their evidence is. They know what our evidence is. We have already presented them with this big book. They have never told us what they decided was wrong about this big book. I think it only fair, therefore, that they tell us as they are telling the Court, so we will have an opportunity to respond. Whatever time they require in the first instance, we could then tell you.

[67] The Court: How many charging parties are there?

Mr. Caruso: Three, your Honor.

Mr. Lambos: I think in this proceeding there are three charging parties.

Mr. Hershlag: Your Honor, while the conference is proceeding, I'd like to take care of one formality.

The Court: They can't hear you.

Mr. Hershlag: It's a formality mostly addressed to the Court. The gentlemen here are not members of the Bar of this Court. I'd like to have them vouched in.

The Court: You want to tell me who they are, or want me to do it by insubstantial and non-frivolous?

He's already admitted. Didn't I do it last time?

Mr. Lambos: No, your Honor.

The Court: You're in—

Mr. Hershlag: That is Constantine P. Lambos.

The Court: —temporarily.

Mr. Lambos: Of course, your Honor.

Mr. Hershlag: There is Thomas W. Gleason.

The Court: Yes. Certainly.

Mr. Hershlag: Ernest L. Mathews.

The Court: You're welcome.

Mr. Hershlag: Donato Caruso.

The Court: You were here before.

[63] Mr. Caruso: Yes, your Honor.

Mr. Mayer: Your Honor, I'm sorry. We were—

The Court: I was just admitting them to the Bar. That's all. Temporarily.

Mr. Mayer: Temporarily.

The Court: Pro hac vice.

Mr. Mayer: Do you plan to disbar them any time soon? We didn't get a timetable here, did we?

The Court: We are asking you for your views.

Mr. Mayer: You're seeking a full brief on the issues. It will take a little bit of time. It won' take today or tomorrow.

The Court: It certainly won't be today.

Mr. Mayer: No.

Mr. Fitzsimmons: May we have just one more moment, your Honor?

The Court: How many charging parties are there?

Mr. DeMember: Three, your Honor.

The Court: Do they all want to submit briefs?

Mr. Lips: Two are represented by us. It's a simultaneous presentation we'll make.

The Court: You want to submit briefs of your own, in addition to the Board's?

Mr. Lips: Yes, sir.

Mr. DeMember: Same with me, your Honor.

[69] The Court: Why don't you work out a satisfactory schedule between you?

Mr. Mayer: If we had ten days—one week. I'm told they'll get this done in a week. I am going on vacation. More power to them. And another week for them to respond, for the Respondents.

I think that's cutting it very fine.

Mr. Lambos: I think we'll both be back here again seeking extensions, and so on. I think we ought to be somewhat realistic.

The Court: They want it quick because they're hurting.

Mr. Lambos: If they give it to us tomorrow, and we have two weeks thereafter to respond to it, that's one thing. I know what has happened. They'll give us volumes of Affidavits and other things that will be like this. I think, in fairness, we don't want to procrastinate here, but we do need a fair amount of time.

The Court: Just from my own curiosity. Are you bound not to make a similar application to another Judge?

Mr. Mayer: Your Honor, we are not bound at this point. We would be bound, as you recognized earlier this week—as soon as you rule, then we would be—that would take care of it. We're not going into another District Court, if that's what you are asking.

[70] The Court: I was hoping you would.

Mr. Mayer: I saw something on the record that I thought you might have been suggesting.

The Court: No. I was just curious.

Mr. Lips: Your Honor, let me point out there aren't any great mysteries in this case. The ILA will not be surprised at anything. They have litigated all these things in these proceedings.

The Court: How much time would you like?

Mr. Lips: We'd like for the 19th to prepare the sub-

mission for the General Counsel and the charging parties, and one week for them to respond.

The Court: You mean you'll do their brief?

Mr. Lips: No. Our brief and theirs. Each of us get a week to the 19th.

The Court: You'll do your own brief, General Counsel.

Mr. Mayer: Of course.

Your Honor, in view of the fact that you are seeking a full brief on the merits—

The Court: You want me to, too?

Mr. Mayer: Absolutely.

The Court: The second thing really was your suggestion.

Mr. Mayer: You are right. We do. My people here [71] in the Region say they can do it in a week. I'm a little hesitant to say we can make it in a week, including typing and serving it. I really question it. My counsel says that he can do it in a week if they can get theirs in a week. Then a week to respond.

Mr. Fitzsimmons: That will be fair, your Honor, if we have a week to submit ours. It would be fair for Mr. Lambos to have a week to submit his. It wouldn't be—

Mr. Lambos: When I was before the General Counsel, he said he needed thirty days. Then he took 15 days more. Then he didn't show us what he had. I'd like to see where he has—

The Court: It all depends where the injunction is. If there was an injunction right now, see, I'll bet they'd be telling me they could have their briefs in in four days and you would all need forty. That is what concerns me about this case.

Look, this is not easy. On the other hand, they are hurting. Ten days. Ten days to respond. That's reasonable.

If you want to get it in earlier, the ten days for response will begin to run from the date of the submission of the first round, provided they are all in. That gives you ten days to respond, gentlemen.

You gentlemen over there can make it—their time run in three, if you have the wherewithal. I think that's [72] reasonable.

Any serious objection to that?

Mr. Caruso: Your Honor, they'd have to serve their papers on us personally, I think—

The Court: Look, come on.

Mr. Caruso: —rather than by mail.

The Court: Ten days from the day you get them. They'll get them to you. He'll have his trucks on the road getting them to you.

Mr. Fitzsimmons: We are not that far away, your Honor. When we file it here, we'll serve it simultaneously.

The Court: From time it is served. They won't be hard to get.

Mr. DeMember: Your Honor, I'd like to call to your attention there is a reporter in the courtroom. In view of the desire of the Board to have the off-the-record remarks kept off the record, there should be some direction to the Court with respect to—

The Court: What in the name of heaven you could do—there is a First Amendment in this country. I couldn't, wouldn't, never have, never would dream of doing such a thing. I think when you reflect on it you wouldn't want to do it, either.

Mr. Mayer: I'm about to go plead right now.

Mr. Lips: It wasn't done seriously, your Honor.

[73] The Court: I'm sure that reporter, whoever he is, will do nothing ungentlemanly or to hurt anybody unnecessarily. But that's in his conscience, not on mine.

Mr. Lambos: Thank you, your Honor.

The Court: All right. Good day.

Mr. Mayer: Thank you very much.

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Appendix C—Transcript of Proceedings—February 23, 1981

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

Civil No. 81-13

Transcript of Proceedings

WILLIAM A. PASCARELL, *et al.*,

Petitioner,

vs.

NEW YORK SHIPPING ASSOCIATION, *et al.*,

Respondents,

and

WEST GULF MARITIME ASSOCIATION, *et al.*,

Parties to the Contract.

APPLICATION FOR TEMPORARY INJUNCTION

Newark, New Jersey
February 23, 1981

Before:

THE HONORABLE HERBERT J. STERN, *U.S.D.J.*

APPEARANCES:

MICHAEL FITZSIMMONS, ESQ.,
BERNARD SUSKEWICZ, ESQ.,
and
JOSEPH E. MAYER, ESQ.,
Assistant General Counsel,
For the National Labor Relations Board.

LORENZ, FINN, GIARDINO & LAMBOS, ESQS. (NY),
By: CONSTANTINE P. LAMBOS, ESQ.,
and
DONATO CARUSO, ESQ.,
For New York Shipping Association.

GLEASON, LAITMAN & MATHEWS, ESQS. (NY)
By: THOMAS W. GLEASON, ESQ.,
ERNEST L. MATHEWS, ESQ.,
and
IRWIN HERSHLAG, ESQ.,
For International Longshoremen's Association and ILA Local Unions in the Newark port-area and the ILA Atlantic Coast District Council.

TAFT, STETTINIUS & HOLLISTER, ESQS. (OH)
By: J. ALAN LIPS, ESQ.,
and
THOMAS R. SCHUCK, ESQ.,
For American Trucking Associations, Inc.

GARSON, DE MEMBER & WEINER, ESQS. (VA)
By: RAYMOND P. DE MEMBER, ESQ.,
For a Charging Party.

[3] The Court: Well, we have been the beneficiary of your very excellent efforts. Have you all received the very recent opinion by the Third Circuit in the ConEx-Twin Ex case?

Mr. Lambos: Yes, your Honor. We have.

The Court: Have you read it? I suppose you have.

Mr. Lambos: Yes, your Honor.

The Court: As I read it, a clue has been given to us as to what to do with this 10(1) application. I might say that after that opinion came down a lot of our thinking had to

be rethunk and our writing had to be rewrote. And I have a very elaborate thing to say here. But before I say it, I think maybe I ought to give counsel an opportunity to address that opinion, because it seems to me the Circuit is saying that I should grant a 10(1) in this case.

Do you want to say something?

Mr. Mayer: Yes, before we go any further. I have one, now two preliminary matters.

The first thing is this letter that I was just handed.

The Court: It came into my office this morning. I felt in fairness I ought to give copies to everybody.

Mr. Mayer: What I was going to do, I wanted to make it known we had nothing to do with this.

[4] The Court: Of course not.

Mr. Mayer: The second thing, your Honor, we have a stipulation on another matter that I would like to take care of before you hand down any decision here. I think it's a stipulation between the—between some additional respondents in another case pending in South Carolina, whereby they stipulate to be bound by whatever, as does the General Counsel, whatever happens in this case. I'll be glad to give it to your clerk following the hearing. I wanted to announce it before the decision was rendered.

The Court: All right. That's fair. My clerk told me about that, I think, last week.

Mr. Mayer: That's right.

The Court: I'm not entirely sure that is of any moment to us. That is to say, we have no case in controversy before us with those people. They are not parties to this litigation.

Mr. Mayer: That's correct, your Honor.

The Court: Well—

Mr. Mayer: They voluntarily submit to the jurisdiction.

The Court: You got to add them as parties or do some-

thing. Otherwise, just on the basis of terms of jurisdiction, I have no jurisdiction over them. The people can walk in off the streets and file papers in this case. You [5] got them. That's good. Want to add them in some way?

Mr. Mayer: I understand—I recognize there may be some procedural problems.

The Court: You can file it.

Mr. Mayer: Fine.

The Court: If it comes down to enforcement, you may have to take some other steps, as well.

Mr. Mayer: All right. Fine. I understand, I understand.

The Court: A and B simply can't walk in here and file a stipulation and walk out.

Mr. Mayer: Some of the parties are—they're identified at least in interest with the parties in this case.

The Court: I know.

Mr. Mayer: We'll submit it for whatever it is worth.

The Court: We Judges like to show how smart we are.

Mr. Mayer: Ha, ha.

Mr. De Member: Your Honor, may I for a moment? I don't think any of the counsel at this table have a copy of that decision. I was informed of it by telephone on last Thursday or Friday. I didn't get a copy.

The Court: We may have a couple in our chambers. [6] You're welcome to what we have.

Mr. Lambos: Your Honor, I have, I think, one here they may have. I think they can photocopy it, if they like.

The Court: You know, we'll not spend all day on this.

(Letter taken by the Clerk to photocopy.)

Mr. Lambos: If your Honor—

The Court: Besides, they don't have to worry about it much. You got to worry about it.

Mr. Lambos: We're not very concerned about it, your Honor. Yes, I say we're not very concerned about it because

I would be surprised that on a remand of the ConEx antitrust case by the Supreme Court of the United States to the Third Circuit that the Third Circuit would believe that they had the power or the authority to direct your Honor in this matter, in a case in which they had no record, they were not aware of the petition, they were not aware of the facts except to the extent that the attorneys for ConEx, Messrs. Steptoe & Johnson, during the course of the argument, brought to the Court's attention that this matter was pending before your Honor. But, obviously, they had no record. Obviously, no one could possibly argue that they had authority with respect to this case at that time.

And it is especially so when this case does raise [7] such particular and different issues than were before the Court in the remand on the ConEx case and that were before the Third Circuit in any 10(1) case before this proceeding.

In our presentation—and I might say parenthetically, because we have filed, as we have done in every case where we have had petitions for certiorari or other proceedings, we've always, as you remember, given your Honor copies of those.

The Court: We got this morning your mandamus.

Mr. Lambos: Yes. We filed now a petition for mandamus because we believe that mandamus is the remedy that we are entitled to because of the three errors we point out that were committed by the Third Circuit. We say this with all due respect in that—

The Court: I'm only smiling because I can't—come on. I can't be blind to the likelihood of success of a petition for mandamus to the Supreme Court. It is almost easier for the proverbial wealthy man to get into heaven or a camel to get through the eye of a needle.

Mr. Lambos: A man's reach must exceed his grasp.

The Court: What is a heaven for? Bobby Burns? Let's go.

Mr. Lambos: We do believe—if your Honor will note with respect to the jury trial, it is one where we have [8] been instructed, I think, by the Supreme Court that this may be the proper remedy and may be, also, the only remedy.

While we understand it is difficult even to obtain certiorari, when you look at the facts of the matter, we know there are two proceedings involving this case where certiorari was granted, and we do believe we have a fair chance of obtaining mandamus. That is, parenthetically—

The Court: If you would obtain mandamus it wouldn't be on what concerns me in that opinion. Nothing they have written there is of concern to me in this case except to the extent they addressed the requirements for 10(1) or what a District Judge should do in a 10(1) application in this Circuit.

Mr. Lambos: That, of course, is pure dicta. It is not part of the case. It is not an issue in that case. And I would again repeat to your Honor—

The Court: Do you know what dicta is?

Mr. Lambos: I thought I knew.

The Court: Dicta merely permits courts of equivalent levels to disregard what they say. District Judges don't usually dismiss the words of the Court of Appeals if on point to the issue.

Mr. Lambos: And if the matter before them, I would assume, was a 10(1) matter and there was no 10(1) considerations in that case—

[9] The Court: Well, that's what made it dicta there. It didn't make it non-applicable.

The real point is, we can play around with dicta all we want. Dicta means they can disregard what they've said

if the same case come down again. Doesn't necessarily mean that I can. Technically, I, under the law, can say it is dicta.

I can't be blind to the fact that three Judges of the Court of Appeals subscribed to that. They have said that is the standard to be applied in 10(1).

Mr. Lambos: But they have not reached the other issues before your Honor in this case. Assuming, you know, they haven't changed any rule by the statement that they went into, because, as your Honor well pointed out in the arguments on January 5th and on January 12th, the standard in this Circuit appears to be frivolity and insubstantiality. The Court there has repeated that.

It says, "One added reason for it, we will now tell you, is the question of consistency." That aside, it also appears they have not addressed the standard of reasonable cause and they have not addressed the standard of just and proper.

The Court: They have just and proper.

Mr. Lambos: It appears to me, your Honor, that just and proper, even in the Third Circuit, may mean something [10] more than the few paragraphs written by Judge Gibbons in that determination. And I would venture to say, again—and I repeat—that it appears to me that there was no intent there that that be used as a lesson in a proceeding not before them, because that would be a most unusual—

The Court: Then why write it?

Mr. Lambos: I would understand that might be a question that came to our minds as well, your Honor. I do not know.

The Court: Whenever a Court writes what is dicta, it is only to give people guidance as to what to do if that situation which is not before them arises. Of course, the unfair-

ness about the doctrine when it does arise, they say "dicta" and everybody else has been living under it. But this, of course, is not the moment for such a discussion.

Mr. Lambos: I say, your Honor, they did not have this record before them, because it is so important to notice what has happened in this proceeding in the various papers now filed by the General Counsel and the charging parties which indicate so clearly that they are refusing to obey the mandate of the remand of the Supreme Court of the United States, that in 35 of their various Affidavits they continue to look not at the industry that they are supposed to look at; namely, the longshore and shipping industry. They continue to look at trucking. They continue to look, as [11] the Dickman Affidavit points out, at warehousing. They continue to look at all these things and only one Affidavit do they submit on the longshoring industry. And that is the Affidavit of Captain John N. Haynes, the Affidavit relied on by the Supreme Court of the United States and the District Court of the District of Columbia, which must stand as an admission on their part on the frivolity and insubstantiality of their theory.

The Court: I cannot find—look, I can't find that it is frivolous. I simply can't do that.

Mr. Lambos: Your Honor—

The Court: I disagree with my Circuit. I think their standard is not right. I think it's not right for lots of reasons. But I can't find in the history of this litigation over the past eight years that all these Courts have been rendering decisions which were insubstantial and frivolous. I disagree with them. I just can't do that.

Mr. Lambos: I understand, your Honor.

Perhaps I ought to restate my position with respect to them. I would agree that up to the point that the Supreme

Court of the United States spoke, looking only at the work on trucking stations, consolidation stations and warehouse stations and not focusing on the real work in issue, might not have been frivolous and might not have been insubstantial. I am only suggesting, your Honor, that since [12] the Court spoke, if your Honor will look at the 31 Affidavits, only one of them speaks of the work on the waterfront. And we are willing to accept that and they have admitted by their tendering that in support of their theory that the only work here is that on the waterfront, and the Haynes Affidavit is the only Affidavit that is entitled to be looked at; that all of these other Affidavits talking about trucking stations and other things should be cast aside.

May I also suggest to your Honor that their theory, which has now been restated in their reply brief, is that there has been such an economic change in the industry that work formally that of the longshoreman may no longer be that of the longshoreman. And seven times—

The Court: This—look, this whole dispute, old as it is, growing older, smacks very much of a dispute between—like between nations over who owns certain pieces of ground. Depending at what point in history you begin your analysis largely determines whose ground it is, especially when armies have been marching back and forth over the ground. If you roll back to 1950, you win. If you go back to '58, it becomes unclear. If you rely on 1968, maybe you lose. The whole touchstone is at what moment you begin counting. That is, as I see it, this whole question of work preservation versus work acquisition.

[13] But that's not really the issue. Before I leave it, I really can't find that either of those two views, yours or theirs, is frivolous or insubstantial, and I'm not going to.

But that's just the merits. There is—another question is you're here on a 10(l), which is who is going to bear the expense of the litigation? That is what the whole dispute is about. Who is going to have to shoulder the costs of the Board's determination as to whether it is work acquisition or work preservation?

Maybe that is wrong thinking, but that's the best I've been able to reason out of this whole thing.

Well, you say, "Well, the status quo will be preserved." What is the status quo? Is it six months' status quo, one month's status quo, six years' status quo, twelve years? Well, in a case like this, which doesn't involve sudden strikes, so forth, so on, also depends on when you start counting.

There is another aspect to it. Someone has got to shoulder the economic costs for however long it takes the Board to decide the issue. Once the Board decides it, then you'll go directly from there to the United States Court of Appeals. The only thing for me to really decide here is who is going to bear the costs of the adjudicatory process. I think that's what it really amounts to.

[14] It is perfectly plain to me that if there is no injunction that all the people on my left are going to be very anxious for a very speedy determination, and if there is an injunction, all the people on my right are going to be very anxious for a speedy determination. That is simply because of who is bearing the freight.

Mr. Lambos: May I suggest to your Honor that the people on this side are going to be anxious for a speedy determination in any event and have always been? And I think that our briefs and Affidavits indicate it.

The Court: I'm not using that to say that anybody will be

deleterious. I'm just saying one side or the other has to get bit here.

What I'm somewhat disturbed about is when a Court makes that determination it ought to be the Court that makes it. That's a peculiar Article III type situation.

What is somewhat disturbing about the 10(l) standard that appears to be in this Circuit is that, really, the Court doesn't make that decision. Not even the NLRB makes that decision, because the NLRB doesn't get to decide it until later. Apparently, it's counsel. And I mean no disrespect to counsel for the NLRB, who, as long as he's acting not frivolously, can decide in a case like this, one side or the other has to bear the complete economic costs of however long it takes to adjudicate this before the Board. [15] That's what is somewhat disturbing about a 10(l). But what I really called upon you to address was the plain words of Judge Gibbons' opinion, which seem to indicate that is exactly what the United States Court of Appeals for this Circuit wants. At this point let it sit to frustrate the plain commands of that Court. I can't do that. That would be improper for all of us.

Mr. Lambos: Except, your Honor, you are required to, obviously, obey the commands of the Third Circuit Court when it properly addresses a question before it. And it would be a novel concept. It's a silly thing for me to say, but in thirty-three years in the practice of law, this is the first time that I have ever seen a situation where it might appear, and I hope it doesn't appear properly, that an appellate court is giving an advisory opinion, because that, too, would not fit within the Constitutional mandates as set forth in Article III. And I, therefore, say that this Court is not only not bound by what the Third Circuit may have said parenthetically and in passing in an antitrust situa-

tion. but is required to look at the record before the Court and determine the issues before it on that basis.

It also appears to me that it was talking about 10(l) in support of its determination in that case that it should stay the proceedings. And they said, "Why should we stay the proceedings?" Well, because we don't want a [16] conflict. It's for that reason that we have this rather limited standard in 10(l) cases. And we understand no new law was expostulated in that case by Judge Gibbons. And if it was intended as a signal to your Honor, and we hope it was not, we consider that that is not a proper method of instructing the various Judges in this Circuit, and there are more Constitutional means where such instructions might be given.

The Court: All right.

Mr. Lambos: In any event, your Honor, we'd also like to stress one more thing in that same type of context. Where is this case and where should it be? You will remember that on the 5th of January I had raised the issue, which we again raised in our 10(l) standards brief on Page 8, that perhaps this case was not properly before your Honor in the first instance. And you will remember that on that date your Honor said that you could not agree that it should have been in the Circuit Court of Appeals and not here.

We have, of course, presented to your Honor on Page 8 the decision—the only decision we have found on this subject, which is a District Court of California decision. And that is set forth in our standards brief on Page 8. And in that determination, which is Great Western Broadcasting Corporation against Hoffman at 214 F. Supp. 173, the Court properly held, in our view, that 10(l) applications [17] should not be made in this context, but that it should go before that Court which has remanded; namely, the

Court of Appeals. That would be here the various Courts of Appeals that have remanded; namely, the Court of Appeals for the District of Columbia and the Court of Appeals for the Second Circuit.

As we pointed out, you might find that a Circuit Court's reversal and remand were assailable to a lesser standard, 10(1) standard, whereas, had they gone before the Courts of Appeals with respect to their request for restraining order or injunctive relief, as they might have, that they would have a different standard to meet.

The Court: You say I lack jurisdiction?

Mr. Lambos: Yes, your Honor. We have said that from the very beginning, if you will remember. Obviously, we'd like the record to indicate that we have so argued before your Honor.

The Court: The trouble is that the United States Court of Appeals for the Third Circuit thinks we have jurisdiction.

Mr. Lambos: I don't know that they've heard and decided that point, either. Another novel matter.

The Court: Yes.

Mr. Mayer: I don't know if you would like me to address that or not. But the fact is, we, of course, [18] believe that is wrongly decided. The Great Western case, it is a somewhat different case. It was a continuation of the same conduct occurring after the remand, whereas in our case we have new conduct. It's a different kind of conduct. The same sort, but a different conduct.

The Court: Let me ask you a question. If I give you an injunction, I will certainly not give you an open-ended injunction. What would be reasonable time constraints?

Mr. Mayer: Your Honor, that is going to require a long, a somewhat prolonged response.

In the first place, the Board acted Friday on our motion to consolidate the cases with the remanded cases, and they did so. So those cases have been remanded for an expedited hearing before an Administrative Law Judge.

The Court: Meeting with him tomorrow?

Mr. Mayer: Meeting with him tomorrow. I understand that he has set three days for the pretrial hearing or conference.

You must understand, as you do understand—I don't have to point it out to you—there are already massive records before this Administrative Law Judge from the prior cases before him. He has another case termed Beck Arabia that was also consolidated. And he has these cases.

Now, most of the evidence, I think, is applied—would be equally applicable to all the cases. There is a [19] substantial body of evidence already before him. But we are going to have a pretty long hearing, it seems to me, and there is going to be a lot of evidence for him to consider, and it is a very ticklish case on the legal merits.

The Court: What do you mean by "ticklish"?

Mr. Mayer: Very difficult issue on the merits.

The Court: It could go either way?

Mr. Mayer: It could go either way. I don't—I think this is a case that can go one way or the other. There is substantial legal arguments to be made on both sides. No question. It is going to be a difficult matter. It is going to be a huge record and it is going to be an enormous decision, and the Board has the same record to go through upon review.

The Court: Do you have discretion not to ask for an injunction?

Mr. Mayer: Your Honor, under the Act we do not.

The Court: You must—

Mr. Mayer: We must seek injunctive relief. There are exceptions, and that is where the respondents will agree not to continue its conduct pending—

The Court: Obviously, that is the standard.

Mr. Mayer: —or if the conduct has terminated and there is a promise not to resume—

The Court: You mean if it is not there you don't [20] go?

Mr. Mayer: Otherwise, we are mandated to seek relief. Yes, your Honor.

As to what is a reasonable time? I can't possibly tell you. This case is not going to be handled by the Administrative Law Judge and the Board within a year. I can almost guarantee that. This case is going to take a long time.

As I told you before, the Board in its present stature, we only have three members.

The Court: Since you say this case could go either way—

Mr. Mayer: Yes.

The Court: Suppose you get the injunction and it goes the other way?

Mr. Mayer: That's happened in the past, your Honor. It wouldn't be the first time. Someone loses in a case like this. The public—

The Court: Yes, but they generally lose at the end of the case. The trouble with this proceeding—my trouble with this procedure is I'm going to create an instant loser today.

Mr. Mayer: In injunction proceedings, that's what happens. Preliminary injunctions do that. This is what the Congress mandated, your Honor.

[21] The Court: Not only am I going to create an instant loser, but if I make the Union the instant loser, they can never recoup.

On the other hand, if the charging party does not get an injunction but prevails ultimately, they can, and, indeed, they have, for example, in ConEx and TwinEx, sue for damages.

Mr. Mayer: Your Honor, we're not here—and I say this in all sincerity—I am not here protecting these people.

The Court: I know.

Mr. Mayer: They are here protecting their own interests. I'm here protecting what we see as the public interest, as set forth by Congress.

The Court: I'm not at all saying that you are—

Mr. Mayer: I'll tell you, your Honor. If the injunction is denied, and the rules say in effect, the public loses. It may be all right for the public to lose. It may be that the Board will determine—

The Court: Which public?

Mr. Mayer: The public in general. The public that uses common carriers for transportation overseas loses, because there can be no question that the system that has been put into effect off the pier has created large-scale economies. This is exactly what the Union is fighting. It [22] has created large-scale economies. It has reduced, unfortunately for the Union, work for their members. But it is a far more economical means of overseas transportation, and the public loses the benefit of that.

If the Union is right, and the respondents are correct in that this is a lawful clause, then they have lost the benefit of it for a considerable period of time. However, if it is unlawful, as we contend there is at least reasonable cause to believe that it is, if an injunction doesn't issue, the public at large loses a great deal. And the public at large cannot recoup the losses if we are wrong.

The Court: Suppose—the trouble is, there is reasonable

cause to believe both ways and both arguments are not frivolous.

Mr. Mayer: I would agree with that, your Honor.

I would point out to you in the Steelworkers' case—I apologize for getting our reply brief in as late as we did. I'm not sure you had a chance to look at it.

The Court: I did. I had it.

Mr. Mayer: In the Steelworkers' case, it was a matter of just handbills. No showing of any loss at all to the handbilled employer. Yet, the injunction issued in that case.

The Court: So this outpouring by both of us was prompted by my question to you—

[23] Mr. Mayer: How long would it take? I cannot give you a reasonable answer. If you were thinking in terms of 90 days or 60 days or even a year, I think you are short of what is going to be required, and that is even under an expedited procedure.

We have—I anticipate at tomorrow's prehearing conference approximately forty attorneys will be present at that conference. Each one of those attorneys is going to be participating in this hearing. Every witness that gets on the stand is going to be subject to cross-examination from every one of opposing counsel. This hearing is going to be a long hearing.

The Court: Who is representing? Who are all the people, all the charging parties?

Mr. Mayer: The charging parties all have counsel and the right to be present.

The Court: You are saying you really got one defendant, the Union; right?

Mr. Mayer: We have the Union and the various stevedoring companies and the various steamship companies who are parties to these contracts. There are a number of them.

To the master agreement now, I believe, there are five steamship—five employer associations, each one made up of various employers. I don't know how many counsel they intend to have there, but there are going to be a substantial number [24] of attorneys representing a substantial number of interests. This hearing is not going to be short.

The Court: This hearing, by the way, is just to determine whether it is work acquisition or work preservation; right?

Mr. Mayer: I'm sorry. I didn't understand the question.

The Court: This hearing is just to determine whether it is work acquisition or work preservation?

Mr. Mayer: No, your Honor. There are two significant issues. If the Union and Respondents can get by the first one, that it is work acquisition—work preservation, they still have the second hurdle to get over; that is, to show that the steamship companies have the right to control that work within the meaning of the Supreme Court's decision in the Enterprise case.

The Court: If it is work preservation, the second would seem to follow.

Mr. Mayer: No. Just the contrary, your Honor. Just the contrary. Even if it is work preservation, if the agreement is between the Union and a party who is not in a position, lawfully, to provide the work, to assign the work to the Union, it becomes secondary even though the contract, itself, has a primary thrust. It becomes secondary because the contracting employers are not in a position to grant the [25] Union the work that it is claiming. That is precisely the situation that occurred in the Pipefitters' case, which is Enterprise, or the Supreme Court decision that adopted the Board's right of control test.

The point is—I will just briefly give you the facts, if you don't mind—a subcontractor, plumbing subcontractor had

a clause, had a contract with the Union, whereby the Union insisted that it was going to perform all of the pipe threading work on any job site where this employer worked. And the Supreme Court and the Board both found that was a perfectly legitimate work preservation agreement, because the Pipefitters had always done that work.

The subcontractor, however, became the subcontractor on a job where the engineer or the architect on the job had arranged to have a special kind of pipe installed which required threading in the factory. It couldn't be done on the job site.

The Union then, when these pre-threaded pipes were brought on the job site, relying on its contract, refused to install the pipes, saying, "This is our work. It has always been our work."

The Supreme Court said, "Maybe so, but the contract under which the subcontractor had agreed to perform the work provided that he was to install this pre-threaded pipe." And it was not within his power to assign that work of [26] threading the pipe to the Union, because it was mandated that he use this pre-threaded pipe. He had no lawful right to assign it.

So despite the fact that it was work preservation and that the clause on its face was a lawful work preservation clause, it violated Section 8(e) and the conduct violated Section 8(b)(4), because the contracting employer couldn't assign it.

That is our position. That is why, incidentally, so much of our evidence related to off-pier work. We were trying to demonstrate that.

The Court: How long will it take for a decision, realistically, a decision to emanate from the ALJ before the Board and the world?

Mr. Mayer: Your Honor, I have made it perfectly plain to the Board that this case must be expedited. The Board knows that it must be expedited. As counsel for the Board, I told them of your problems. They are aware of your problems. They have issued an order insisting upon an expedited hearing. The case will be expedited.

But in a case of this nature, I would say there is no assurance that this order would issue within less than a year to two years. I simply cannot conceive of this record—

The Court: You are talking about me issuing an [27] injunction for a two-year period?

Mr. Mayer: Your Honor, I'm asking you to issue it until the Board can decide the case. I'm not saying it will take two years. It would not surprise me if it took two years. I would hope it could be done in a briefer period of time, but this is just as massive a case as has ever come before the Board.

I say the Board is fully aware of the need for expedition. The urgency has been pointed out by every Court that has seen the case, including yourself. But I just—I cannot say it is going to be in six months or a year. I could not make any such assurance.

The Court: I guess the time has come for me to issue an order.

Mr. Mayer: Thank you, your Honor.

The Court: Do you have something else you wanted to say?

Mr. Gleason: I was going to say something, your Honor. I think as far as the length of time goes, in our experience, where there are injunctions, the Board takes a heck of a long time. With this case, it has to be three to five years before there is a final determination. I think the record shows this in all the other cases.

If there is no injunction, as we know, in all these cases, the Russian cargo cases, and what-have-you, the [28] Board runs real fast. They don't have no feeling once there is an injunction issued. Everything goes on.

In this particular case we've had an injunction in 1973. Everyone—most of these parties, I would say 70 percent of them were complaining. We're not in business. They only came in business because of an injunction. They never had this work. And if you look at the Affidavits, they all talk about 1977, 1978.

What are we going to do again is by an injunction that we have further people coming in the industry, and just by injunctions we're out of business.

The other thing is that on the other side of the coin, as far as it goes, we can never recoup. As far as the consolidators, they only amount to about 10 percent or 15 percent of the work right now. 80 to 85 percent of this freight at present moves across the piers without any handling whatsoever. So the public has no benefit of that.

With reference to the consolidators, they have no problem. They can bring the freight, take it and bring it down the pier, where it will be put right in the containers so there is no—there is no additional cost. They get it. The problem here is trying to get the $525 from the steamship company.

[28A] The Court: All right, gentlemen.

In this proceeding, the Regional Director of the National Labor Relations Board seeks a temporary injunction—preliminary injunction pursuant to 29 United States Code, Section 1—pursuant to Section 10(l) of the National Labor Relations Act, 29 U.S.C. 160(1). Thus, this Court is required to write another chapter in the tortuous litigation precipitated by the advent of containerization in the ship-

ping industry. Specifically, the petitioner seeks to enjoin the International Longshoreman's Association, the New York Shipping Association, and the Council of North Atlantic Shipping Associations from implementing the by now famous or infamous Rules of Containers. The Regional Director is here today because on December 19, 1980, the American Trucking Associations, Inc., Twin Express, Inc., and the International Association of Non-Vessel Operating Common Carriers filed charges with the NLRB alleging that the implementation of the Rules on Containers by the respondents constituted unfair labor practices. The so-called charging parties alleged, in particular, that the union and the sea carriers were violating Section 8(e) of the National Labor Relations Act which outlaws, quote, "hot cargo" agreements and Sections 8(b)(4)(i)(ii)(A) and (B), which prohibit secondary boycotts. After having concluded that there was reasonable cause to believe that respondents were, indeed, engaged in unfair labor [29] practices, the General Counsel issued a complaint on the charges and came to this Court seeking a 10(l) injunction.

I might add parenthetically, and as counsel for the Board has so candidly agreed this morning, there is also reasonable ground to believe that there is no violation of hot cargo prohibitions, and that the charging parties are incorrect in their allegations.

An initial hearing was held before me on January 5, 1981 on petitioner's request for a Temporary Restraining Order. It appears undisputed that on December 6, 1980, the ILA and the employer associations agreed to implement the Rules on Containers effective January 1, 1981 in all ports from Maine to Texas, except in Philadelphia, where an injunction granted by Judge McGlynn remains in effect.

Off the record.

(Discussion off the record.)

After hearing argument, this Court denied the application for a Temporary Restraining Order. A further hearing was held one week later on January 12th. At that time, the General Counsel sought a preliminary injunction. The Court heard argument and laid down a briefing schedule for the parties. Those briefs have been received, additional argument was heard this morning and the Court will now render a decision.

First, let me quickly review the genesis and [30] development of this most complicated and extended controversy. The Rules on Containers were promulgated in response to the technological development of containerization in the shipping industry since the 1940s. The introduction of increasingly large containers has enabled the shipping industry gradually to replace piece-by-piece loading and unloading work performed by the longshoremen on the piers with block handling of cargo. By use of mammoth containers, shipments of diverse firms can be consolidated into one container which can be, quote, "stuffed," end quote, far from the waterfront. The containers are then sent to the piers, where they are loaded onto waiting ships. This innovation has increased productivity, but has produced decline in demand for the services of the members of the ILA.

In 1958, the ILA protested the use of containers and commenced a strike against the New York Shipping Association, on whose side of the table it now sits for purposes of this litigation. In the contract adopted in resolution of that strike in 1959, the union agreed that, quote,

"any employer shall have the right to use any and all types of containers without restrictions," end quote.

In the following decade, fully containerized ships were introduced and the use of containers increased dramatically. The loss of work opportunities occasioned by these developments led the ILA to negotiate the Rules on [31] Containers. These negotiations were in 1969. As noted, they have been implemented in December of last year. By these agreements, the New York Shipping Association guaranteed that all cargo lots which had been of less than a container size and which had been consolidated with other lots into one container would be stripped when the container arrived on the docks by longshoremen on the dock, if the cargo had orginated from or was to be shipped to a point within 50 miles of the dock. The Rules provided for a penalty, which now stands at $1,000 per container, to be assessed against any carrier that permitted a container to pass through the dockside without being stuffed or stripped in accordance with the Rules.

The charging parties in this action are engaged in the business of containerizing less than container load or less than trailer load cargo for shipments that originate at inland facilities located within 50 miles of the various ports covered by the Rules. Among the charging parties are consolidators who utilize or consolidate the crates of several customers into large containers provided by the shipping companies. The consolidators pack their customers' crates into containers, and then have them trucked, in many cases, by other of the charging parties, to pierside facilities where they are loaded onto ships.

The charging parties have alleged, as was [32] mentioned at the outset, the Rules violate Section 8(b)(4)(i)

(ii)(B) of the NLRA, which forbids union activity which forces any employer to, quote, "cease doing business," end quote, with any other employer, and that the ILA and New York Shipping Association have also violated Section 8(e) of the Act which prohibits agreements requiring such a cessation. In essence, the consolidators and truckers claim that the Rules illegally seek to give the ILA control of work activities to which they have no right and that the carriers have been coerced into the arrangement by the threat of monetary penalties and strikes.

This dispute has had, of course, has had a history all of its own. The General Counsel appeared in this building, long back in 1973, and successfully obtained a 10(l) injunction from one of my colleagues. The unfair labor practice charge worked its way through administrative hearings, decisions by the NLRB, by the Second, Third and District of Columbia Circuits, as well as the First and the Third Circuit. Finally, after seven years of litigation and with the implementation of the Rules held in abeyance by Court order, the Supreme Court of the United States issued a decision in the original cases on June 30, 1980. The Supreme Court majority held that in determining that the Rules on Containers violated Section 8(e), the NLRB had applied an incorrect legal standard. The correct legal [33] standard according to the majority was twofold: First, whether the union's objective was the preservation of work traditionally performed by employees represented by the union, and, second, whether the contracting employer has the power to assign the work to the employees in question. The Board's error, according to the majority opinion, was in focusing on the stuffing and stripping work done by teamsters at the places of business of the freight con-

solidators rather than on the work formerly done by longshoremen at the docks. Rather than its passing on the legality of these Rules, under this new two-pronged test, the Court instead remanded the case back to the Board for further hearings. That means that these past eight years there has been an injunction against the implementation of these work rules, and that for eight years one side to this litigation has had to bear all of the economic costs of the entire adjudicatory proceedings and that today, eight years later, we are back exactly where we began.

We have been advised by the parties that subsequent to the hearing which was conducted in this court in this matter on January 12th, the Board issued an order consolidating and remanding the cases pending before it into the hands of one Administrative Law Judge. In its order, the Board urged that a hearing and pretrial conference commence as soon as possible and at such times and places as the [34] Administrative Law Judge determines, quote, "will permit the most expeditious processing of the cases," end quote. We have further been advised that proceedings before the Administrative Law Judge will commence either this afternoon or tomorrow in Washington, D.C. However, we are also advised that the prospects for resolution before the Board are not imminent.

This Court has tried and believes that counsel for the Board has tried to make a reasonable estimate of how much longer we are to wait. Based on colloquy, the Court comes to the conclusion there is no way to make a reasonable forecast, and understands that it is the position of counsel for the Board that even as much as an additional year is too short a time to expect with reason a decision from that body.

Now, after the Supreme Court decision remanding this matter back to the Board, all court orders enjoining the implementation of the Rules, save Judge McGlynn's, dissolved. Therefore, the Rules went into effect on January 1, 1981 for the first time in many years, and that triggered the current controversy. In a sense, it is as though the clock had been completely wound back. The NLRB, first through an Administrative Law Judge, will once again begin examining the merits of the case, and once again the General Counsel seeks 10(l) relief to freeze the status quo [35] in the interim. If it were possible for the union to be the charging party, as we understand it, the NLRB counsel, counsel for the NLRB would have to take the position that their charge, let us say hypothetically, that the consolidators were attempting to frustrate a legitimate union purpose in interfering with bargaining as between the shippers and the union, that such activity was unlawful, such a charge made by the union, if I understand counsel for the Board correctly, would be reasonable and not frivolous. That is to say, if I understand it correctly, the issues presented now again, eight years later for decision by the Board, can go either way; that both parties' positions are reasonable and non-frivolous.

If that is so, it, therefore, follows—at least it seems to follow logically—that if everybody were to get up and move to the other side of the room so that the union was the charging party and the consolidators were the non-charging parties and were it possible to make such an allegation under the law, which it may even be, for all this Court knows, in terms of discriminating or furthering with good faith bargaining between employer and union, I would be forced to conclude that the charging party was making a non-frivolous and reasonable claim.

As I understand further, once counsel for the Board under the Act determines that the claim is non-frivolous, [36] reasonable, and does, in fact, issue a complaint, is required by law to seek a 10(l) injunction simply because a complaint has been filed and because, in his view, the allegations of the charging party are reasonable and not frivolous.

The heart of the dispute before me today does not concern, really, the ultimate outcome of the controversy. This Court, I am sure, under everyone's view of the law, both sides' view of the law, is not being called upon to decide whether the union is right that it is work preservation or the charging parties are right that it is work acquisition. That is certainly not at stake. What is at stake is what standard is this Court to apply when counsel for the Board comes before it with a complaint, a petition for injunction, a request that the parties be prohibited from doing certain activities which they may well have a right to do to their admitted grave and great economic detriment, pending an adjudication which is to occur years later before the Board.

The 10(l) injunction was first addressed in this circuit in the case of Schauffler versus Local 1291, International Longshoremen's Association, 292 F. 2d, 182, Third Circuit, 1961. In that case the Court concluded that the question of whether such an injunction should be issued turned on whether there was reasonable cause to believe that an unfair labor practice covered by Section 10(l) had been committed. In reaching that determination, the Court merely [37] tracked the language of the section.

I will skip, although it should be deemed to be included in this opinion, the relevant portion of Section 10(l) of the Act.

The two key phrases enumerated in that provision are, quote, "reasonable cause," end quote, and, quote, "just and proper."

"Reasonable cause," of course, refers to the standard under which the attorney for the Board is to operate in deciding whether or not to bring the request for a 10(l) injunction. "Just and proper" are the words which are used in describing what the District Court should do in the determination of whether or not to grant the request, which should only be granted, at least in the words of the statute, if the District Judge or the Court, to be more accurate, believes it just and proper to do so.

In Schauffler, this Court gave meaning to the first of those phrases. In order to obtain injunctive relief, the Third Circuit stated: The Board did not show that an unfair labor practice has been committed, but need only demonstrate there was reasonable cause to believe that the elements of an unfair labor practice are present. Nor need the Board conclusively show the validity of the propositions of law underlying its charge; it is required to demonstrate merely that the propositions of law which it has applied to the charge [38] are substantial and not frivolous.

The Court in Schauffler referred to the Congressional purpose underlying Section 10(l) which justified such a minimal test.

The words "non frivolous" are words of art in the law, and trial Judges and Circuit Judges know with a vengence how far removed from reality counsels' argument in any case must be before it can be termed truly frivolous.

The Court in Schauffler referred to the Congressional purpose underlying Section 10(l) which justified such a minimal test. The Senate Report on the bill stated, quote, "The Section 10(l) procedure reflects the Congressional

determination that certain unfair labor practices are so disruptive that where there is reasonable cause to believe they are being engaged in their continuance during the pendency of charges before the Board should not be permitted," end quote.

Thus, in a 10(l) proceeding, the District Court is not empowered under this test to evaluate the merits of the case to any great extent. The ultimate resolution of questions of fact and law is explicitly left to the Board. Rather, the District Judge is required to enter the injunction freezing the status quo pending resolution by the Board if the General Counsel demonstrates that there are factual questions in dispute and offers a substantial, but not frivolous legal [39] theory.

As the Court concluded in Schauffler, "This does not mean that a District Court must always grant an injunction even though it disagrees with the Board's legal theory. If the District Court can characterize the theory as insubstantial and frivolous, it may refuse the injunction. If the Board's theory cannot be so characterized, however, the District Court must grant the injunction since this will best effectuate the Congressional policy against disruption of commerce expressed in 10(l)."

The difficulty with some of that language is that it is not the Board who, at this point, has made any determination. At the moment that a 10(l) application is filed it is only that counsel for the Board, underlined, counsel for the Board has determined that a charging party's complaint has a reasonable basis to it.

The Board at that stage has passed on nothing. Indeed, it is the whole purpose, apparently, of the application for the injunction to freeze the situation until the Board does make its determination. What this Court regards as per-

haps an unfortunate construction of 10(l) in this way gives no real deference, then, to the Board, itself, nor to its expertise nor even, really, to counsel's expertise. All it means is that any time a charging party files a frivolous and not insubstantial matter or that counsel for the Board [40] has determined there is reasonable grounds to proceed on it and so files the complaint, he must come forward. He's required by law to come forward with a 10(l) application, and, if, in those circumstances, the Court is required by law to grant it, we have squeezed out of the words "just and proper" in the statute any real element of judicial discretion in the award of a labor injunction.

This standard, what we may call the, quote, "substantial and not frivolous," end quote, standard, was described in a later Third Circuit opinion candidly, but, nonetheless, approvingly, as a, quote, "relatively insubstantial burden of proof," unquote. Hirsch versus Building & Construction Trades Council, 530 F. 2d 298, Third Circuit, 1976. This test was also upheld in Samoff versus Building & Construction Trades Council of Philadelphia and Vicinity, 475 F. 2d, 203, Third Circuit, 1973.

It has gained its most recent expression, however, only ten days ago in an opinion authored by Judge Gibbons from a panel of the Circuit in the consolidated cases of Consolidated Express versus New York Shipping Association. In the course of deciding some issues which are not of particular moment to us now, Judge Gibbons wrote, quote, "If Section 10(l) were construed to vest in the District Court authority to reach the merits of the underlying unfair labor practice charge, we would face the prospect of [41] reviewing the District Court by the clearly erroneous standard of Federal Rule of Civil Procedure 52(a) while, possibly simultaneously, reviewing a contrary Board decision by

the substantial evidence standard of Universal Camera Corporation versus NLRB, 340 U.S. 474, 1951. To avoid that result we have interpreted Section 10(l) as ancillary to the main unfair labor practice proceeding, and have confined the District Court in Section 10(l) to determining that the General Counsel has reasonable cause to believe that the elements of an unfair labor practice charge are present and that the legal theory on which he proceeds is substantial and not frivolous."

The language of that decision, rendered only ten days ago, with apparently full awareness of the pending proceeding before this Court, makes our path today quite clear. In the view of this Court, unhappy. The Court is unhappy with the standard announced because it believes that there are great problems with a de minimus standard which requires Article III Judges to issue judicial injunctions whenever an attorney presents a non-frivolous argument to the Court.

Without trying to beat a tom-tom or Constitutional excitement, it, nonetheless, is true that while Congress undoubtedly has the power to allocate judicial functions to non-Article III Courts and may set up Article I Courts or [42] tribunals or things in the nature of tribunals such as NLRBs, Tax Courts and other kinds of Courts, and while Congress certainly has the power to invest these courts, tribunals and things in the nature of tribunals with the power to decide things and to even to themselves grant injunctions, it is not so clear that Congress, even if it expressly wished to, has the power under Article III of the Constitution to compel District Judges to use Article III power as nothing more than the extension of an Article I tribunal's discretion.

That is particularly exascerbated when what we have here is not yet even an expression by an Article I tribunal, but merely the view of counsel that the charging party is not unreasonable and not frivolous, while, at the same time expressing the thought that the responding party is not unreasonable and not frivolous.

This Court views this as unfortunate, as well, because, in the view of this Court, it is unnecessary. While, of course, respectful of Judge Gibbons' concern about various standards of proof, and, finally, nonetheless, it seems to this Court it is appropriate to point out that a determination on a 10(l) is a very difficult determination than the one which the Circuit makes after a full development of facts before an ALJ and a decision by the Board.

The burdens of proof, in my view, may or may not [43] be the same. They are very different stages of the litigation; very different kinds of decisions are to be made.

The decision to be made here today is not who is right or who is wrong, but merely the traditional kinds of decisions which are emboweled in notions of who is going to bear the expense of the litigation, who will be enjoined while the appropriate tribunal decides who is right or who is wrong.

Normally, under Rule 65 of the Federal Rules of Civil Procedure, that kind of decision is made after a very careful and sensitive appreciation of the merits, true, and the likelihood of success, but on other considerations as well. Who will be harmed more by the injunction and who less? Who can recoup and who cannot? And where does the public interest lay, either with an injunction or without?

All of these considerations are swept into the fire under a legal standard which compels the District Judge to issue an injunction merely because counsel for the Board pending

hearing before the Board has determined that the charging party is not frivolous.

I say this in no sense, and I hope it is not perceived in any sense of being antagonistic or disrespectful, but, rather, a contribtuion in hopes of the growth of the law in this area. Whether this Court agrees that that ought to be the legal standard or not, it has been made abundantly [44] clear to this Court that it is the legal standard in this Circuit and that this Court is bound and required by the very function of the relationship between the Courts and the obedience which this Court owes to a superior court to implement. It would be dishonorable and dishonest to pretend that this Court of Appeals hasn't at least three times said what it has said or to assume that it hasn't meant what it has said. And it would be equally dishonorable and dishonest to say, in an attempt to avoid the words that the counsel for the Board is appearing unreasonably or with frivolous arguments in hand. I can say none of these things.

Normally, if this Court did, in fact, have the power to decide what is just and what is proper, it would consider the likelihood of success on the merits. It would have considered the relevant hardship to the parties and the possibility of being able to recoup if an injunction is granted or if one isn't. It would have considered the public interest which from time to time has been waved in this courtroom as a means or a reason why this Court should grant an injunction, although, obviously, the public interest here is irrelevant under the standard advanced by the Board and charging parties. It would have considered whether it is really true the consumers are better off. It would have considered whether that really matters or can matter. It would have, in other words, have approached the problem using [45] traditional notions of equity which the Court generally considers prior to issuing a restraint.

The real truth about this litigation, in the view of this Court, is that the 10(1) decision today, just as the 10(1) decision eight years ago, would probably be a determinative factor. Imagine for a moment if a District Judge had not granted a 10(1) in 1973. What would the status quo have been today, eight years later? What will the status quo be four years from now with a 10(1) or without one?

This Court has not made a decision as to whether it would or would not grant a preliminary injunction under more traditional notions of equity because it feels that it is really prohibited under the standard in this Circuit from doing so. But it does seem extraordinarily harsh, at least to me, that a proceeding which must have been created with a notion of calming an emergent situation pending a reasonably prompt forthcoming judicial resolution has been converted into the ultimate weapon of the litigation in which, in the end, injunctions are issued by Article III Courts in labor cases with little or no discretion allowed to be worthy of name.

Nor does it seem to be reasonable that one side to the litigation, which is acting as reasonably as the other, and as non-frivolously as the other, which may be as right as the other, which even counsel to the Board cannot say which one will win and which one will lose, it seems a little hard—[46] no. It seems very hard that one side must bear all the economic costs of the litigation for eight years past and what may well be eight years future, and that a Court, an Article III Court, is powerless to consider such factors in fashioning an appropriate relief.

For the foregoing reasons, because I am required to, here, therefore, I do apply the law as announced by the United States Court of Appeals for this Circuit, I will have to issue a preliminary injunction. As I say, and I don't

think I need to burden the record with a lot of findings as to why the position is not unreasonable, suffice it to say, the history of the litigation, itself, the various judicial findings up and down, pro and con, the opinions backwards and forwards, amply demonstrate that counsel for the Board is quite correct, that the position of the charging parties is certainly not unreasonable and non-frivolous. He is also quite correct that the position of the respondents are not unreasonable and non-frivolous, either. So I—

Mr. Lambos: Your Honor, this matter, as you well point out, is so important—and, of course, we understand the reasoning that compels your Honor to do what he is doing this afternoon—we would respectfully request a stay. We say to your Honor that we will move as expeditiously as human means can to ask the Third Circuit to review. We think the issues here are so important we could go as far as we [47] can and as the law permits us to have this review.

We think your Honor well points out that we are now talking about the rules being over. We are talking about the fact that we must now find some new answers if this injunction remains, because, obviously, we are going to have to go back to the bargaining table. It is, therefore, so important, if I might use the public interest as an example, that the industry seek to have the Third Circuit review this matter.

We intend to raise all the issues that we raised before your Honor before the Third Circuit with expedition. We also expect to raise the issue that your Honor was without jurisdiction in this proceeding for the reasons that we set forth.

The Court: I made no finding on that. I should have probably addressed it. I, of course, do find that I have

jurisdiction. The Third Circuit might have jurisdiction. If they are telling me how to exercise it, that is so.

Mr. Lambos: I understand that.

The Court: What is your view on that?

Mr. Mayer: Obviously, your Honor, we would oppose the grant of a stay. The respondents can, of course, seek a stay before the Third Circuit. And if it can convince the Third Circuit there is a likelihood of success on appeal, then they may obtain a stay from the Third Circuit. Of course, it [48] would be to wipe out the entire proceeding here or the purpose of it if you were to grant a stay from your own injunction the day it is granted.

The Court: I had thought about that before taking the bench. I think that you are right that I should not grant an indefinite stay. That would be to honor the Court of Appeals with my mouth, but to undo it with my pen.

On the other hand, it also seems to me that they ought to have one small chance to present this issue. I'm not ruling yet. I'll make a suggestion, then you can tell me why I shouldn't do it. One small chance to present it to a panel of three Judges of the Circuit so they can at least take a look at this record and see whether or not a stay should be ordered.

What I was thinking of doing was to grant them the most modest stay, say a few days. We'll discuss it—if we do it, we'll discuss it in a few moments. So only enough time for them to get up a set of papers and get down to the motion panel in the Circuit in Philadelphia. Any stay I would grant on that basis would be for a very finite time. It would automatically end after—at the moment that we said in the order, unless, of course, continued by three Judges of the United States Court of Appeals.

Mr. Mayer: Your Honor, if I may?

The Court: Yes.

[49] Mr. Mayer: There is, of course, a procedure by which they can obtain an emergency appeal.

The Court: They have to go to one Judge.

Look, you are talking about a vast industry. Even if I grant an injunction which was immediate today, it would take a couple of days, I would think, to get it all straightened out on the waterfront. I'm talking about something like three or four days.

Mr. Mayer: For one thing, I think we all have the same problem. We intend to be before the Administrative Law Judge for the rest of this week. Beyond that, the actual change from the implementation to the non-implementation of the Rule is very easy. Re-implementing it may be more difficult. Ceasing to implement the Rules means the containers go back and forth without interruption.

The Court: I promised you could have a chance to say why I shouldn't do it.

Mr. Lips: Your Honor, the injury that is occurring today includes threats by customers who have been waiting for this particular proceeding to redirect cargo up through the Port of Montreal, Canada and away entirely from United States ports, which will disadvantage the ILA, as well as our clients.

The Court: You don't speak for them, you know.

Mr. Lips: Everybody has been focusing on this [50] proceeding. The injury will not—will occur immediately upon the granting of a stay, because these customers can't wait any longer. They want what they want. It's beyond our power to hold them. It's beyond the power of the ILA to hold them, and they are going to make different arrangements.

Now, the American Trucking Association does not agree with the General Counsel's characterization that the ILA has—or the opposition respondents have as good an opportunity to win this case as we do. I don't think that is established by the record evidence or the records presented. Nevertheless, I'm not going to try to dissuade your Honor from reaching that conclusion if you want to.

The Court: I didn't make such a conclusion. I didn't say that. I said that the counsel for the Board said that. I said that the same man whose discretion I must follow in lock step has said that.

Mr. Lips: Well, I understand your position. But what I'm saying here is that we think that under the Third Circuit test, which has been re-emphasized within recent days, and because of the extreme injury that is occurring, requires or mandates that the injunction issue today and not be stayed. If the ILA and the sea carriers' position is sufficiently meritorious, then another Judge in the request for expedited hearing will see it and grant the stay. The stay will not necessarily be on the basis of that the Judge was totally [51] wrong. It will be on the basis of whether or not that Judge of the Court of Appeals feels there is sufficient reason to stay it pending a resolution by the panel.

So the burden of proof on the appeal to get an expedited proceeding won't be particularly harsh on the opposition. If they are entitled to a stay, one Judge of the Court of Appeals will surely grant it.

The Court: You know, you have won here. The natural result of what you have won is that the economic cost of the rest of this litigation, not for another four or five days, but for months and years, will be borne by your adversary.

Painful as it undoubtedly is to you to wait even a few

days more, it will be painful to them all the rest of the time it takes. I might have set this matter down for argument next week rather than for today. You know I was in an accident, so forth, so on. It could very well have been a few days later. I have almost invariably in a case of an injunction where there has been a lot at stake, where it is my order and I thought there were reasonable grounds for people to disagree with, I generally have given people an opportunity to at least get before the Court of Appeals to make an argument. I'm not speaking about weeks. I'm speaking about a couple of days.

Yes, sir?

[52] Mr. DeMember: Your Honor, may I speak to that? Your Honor has spoken several times concerning the cost of litigation and the losses incurred by one side or the other, whether you grant or deny the injunction. I spoke at the hearing on January 12th with respect to the guaranteed annual income. The cost to the workers is nothing, your Honor. There will not be any firings. There will not be loss of pay. They will receive pay whether the work loss is attributed to us or not if they do not work. I'm not convinced they could ever attribute the loss to us. But even if they can, they would suffer no losses, whereas the charging parties are suffering losses today and have been since January 2nd and cargo is being diverted to Canada.

I have received telephone calls over the weekend from NVOs who have stopped operation in Savannah and Charleston. That is not in the record. I recognized that.

I received calls from Florida with respect to something I worked out with counsel with respect to taking shipper owned and leased containers. I haven't had a chance to talk to him. They have stopped five containers Friday

from making a sailing. This is going on day after day, no costs borne by them in terms of lawyers' fees.

The Court: I wouldn't dream of it.

Mr. DeMember: I understand. But the cost to the parties is not suffered by the Union. They will not [53] lose jobs. Whatever has been going on for seven years, the guaranteed annual income is paid and funded by the shipping public, including the NVO charging parties.

Mr. Gleason: Your Honor, first of all, I don't think he understands what the plans are.

Second of all, every time a man does not go to work there is less money going into the pension funds and welfare funds in these ports.

One of the problems, and that was the reason why in negotiations, when we thought that the Supreme Court would come down with a decision, that we would put this over with an opening clause because we thought we could settle it by December the 1st.

As far as the Union is concerned, there is no 2,080 hours guarantee in New Orelans. There is no guarantee in Mobile, Alabama, and, probably, having us opening the contract to give the guarantees up and down the coast, which will be an added cost to the public if we have to go that way—

The Court: It is wonderful how everybody becomes interested in the public welfare when their business is threatened. It is amazing how time after time we all become so public spirited when there becomes a reason why we should prevail in our own case.

I can make no finding on the basis of what I've [54] heard of where the public interest lies. I'm told by freight forwarders and consolidators that the public is very much interested in strong unions with lots of jobs on the water-

front. Maybe so, maybe not. But I understand what is really being said to me by both parties.

Mr. Mayer: Well, your Honor, perhaps the government should be heard from.

The Court: Yes. What I want to know from you, is it unreasonable to give a stay for three days to get a panel? I'm not saying an open stay until they get to a panel. I would say, "I grant an injunction and stay it to a date and time certain." I'll grant no additional stays. Any other times have to emanate from Philadelphia.

Mr. Mayer: What I was going to suggest, if the stay is going to be that brief, why not permit them to seek the stay from the Circuit Court?

The Court: It shouldn't be done on the yo-yo basis; now the rules are in, now they are out. Besides, that is what is always done on an injunction; when you think there is a reasonable basis, to let them take a bite at the Circuit.

Mr. Mayer: While I'm standing, let me make two points, if I may.

The Court: You'll tell me about the meeting you'll have in Washington.

[55] Mr. Mayer: No.

The Court: You'll be meeting in Washington for the next two or three years in this case.

Mr. Mayer: This is the pretrial hearing.

The Court: Oh, I understand. But I'm sure that—

Mr. Mayer: A conference.

The Court: Listen, that Administrative Law Judge whose decision you can't even promise within the next year will just have to wait until the United States Court of Appeals in three days takes a look at this whole situation and decides, you know, who should—what—really, I can't find that.

Mr. Mayer: If I may, I would like to make another point, your Honor. The public interest in here—in this case is not simply the benefits or losses to the charging parties, to the respondents. It is to, A, the enforcement of the Act; the Act should be enforced in a quick and effective way.

The Court: So when is the decision from the Board, or is my decision enforcing the Act? Is that what you are telling me?

Mr. Mayer: It is enforcing, your Honor, the purposes of the Act, which is to terminate conduct.

The Court: Which is what?

Mr. Mayer: The conduct in this case is a [56] boycott. Non—

The Court: You mean it is not frivolous?

Mr. Mayer: —substantial.

The Court: It is also not frivolous, a boycott?

Mr. Mayer: You are sort of putting words in my mouth. I know you're not exactly doing that. Our position is that our argument in the theory of violation and the facts we think we can establish—provide a substantial basis for believing the conduct, the boycott that is involved here, violates—an ongoing boycott violating the purposes of the Act. I conceded to you, I will concede again, their arguments that it is not an unlawful boycott are also substantial.

I'm not about to balance who is going to win the case. That is for the Board to decide. I am simply saying there is a substantial basis for believing that this boycott is unlawful and should be terminated.

The Court: That is an interesting point. The Counsel's offices doesn't want to take a position which side it believes is correct?

Mr. Mayer: Another point I'd like to make. You say "counsel for the Board." It is the Board's General Counsel

who has this authority under Section 3(d) of the Act. He was given the authority to issue or deny complaints. The complaint is issued when the General Counsel or his [57] Regional Director, who acts as his agent, determines on the basis of the investigation that there is a valid claim that the Act is being violated, that the facts disclosed by the investigation provide him with a substantial basis for believing there is a violation; he believes there is a violation.

Now, he hasn't tried the case. We haven't taken the evidence in a court or under oath. He hasn't evaluated an entire record, so he can't say that there is a violation. The most that he can say is that there is a reasonable basis for him to believe there is. We would not be proceeding in this case if he didn't believe that there was a violation. But that is not to say—

The Court: You're asking for no stay?

Mr. Mayer: I'm sorry?

The Court: You are requesting no stay?

Mr. Mayer: That would be our position. Yes, your Honor.

The Court: All right. I guess maybe I will not grant a stay. I may well accede to your request. I just think—I think the law in this area is not a happy thing in this Circuit, but it really is beyond my authority to do anything about it.

Yes?

Mr. Caruso: Your Honor, I think that, as your Honor pointed out, we are talking about something that is not [58] only the Port of New York and New Jersey and the CONASA points of Baltimore, Philadelphia, Boston and Hampton Roads. It will impact, in effect, 36 points from Maine to Texas. It will take a number of days for the

instructions to filter down, in any event. And it would appear to us—and we are willing to make a representation to your Honor—while this stay would be in effect, we would issue the instructions so that in the event a further stay were not granted in Philadelphia that the Rules would be withdrawn in all of these 36 ports.

The Court: How long would it require you to get to Philadelphia and make your presentation?

Mr. Lambos: Your Honor, if we are going to be before the ALJ tomorrow and the next day and the next day—

The Court: That is ridiculous.

Now, look, the most important thing to decide right now is whether there is going to be an injunction. You would agree with that, I take it?

Mr. Lambos: Yes, your Honor.

The Court: The counsel for the Board will agree with that, too.

Mr. Lambos: We would go right to work. I think we can get a set of papers out by Friday and be in Philadelphia Friday morning.

The Court: How long would it take you to get the [59] instructions to the various ports?

Mr. Lambos: We would try to issue the instructions tomorrow and have them permeating up and down so that everybody would know that if there is no injunction—if there is no further stay on Friday the Rules are out as of Saturday.

The Court: Is that unreasonable?

Mr. Mayer: Your Honor, the Rules, of course, provide that they will be seeking a stay from the Circuit Court. Under the Rules, we have seven days in which to respond. We can try to make a simultaneous presentation.

The Court: What I would envision happening is they'll present a set of papers. I think the fault is mine. I haven't really made clear to you what I had in mind. I was not thinking of an injunction—a stay of the injunction until it is heard by the Circuit. I would grant an injunction, "Stayed until," and I will put in a date and time, which I will not alter. As of that date and time the injunction will go into effect unless a panel of the Circuit or Judge of the Circuit grants a stay.

In other words, I'm really only giving a modest stay for a definite time so they could get down to the Circuit. The Circuit can take a look to see whether or not it wishes to grant a stay. That's all.

Mr. Mayer: Can I have just a moment, please?

[60] The Court: Sure.

(There is a pause in the proceedings.)

Mr. Mayer: Your Honor, I see some real problems with your suggestion. In the first place, it would—I hate to keep bringing up this thing. We're having parties—not just these parties, but other parties from all over the country or all over the East Coast coming to that hearing tomorrow. They made plans to get there.

The Court: Not your problem.

Mr. Mayer: My problem in the sense someone has to be preparing papers opposing motion for a stay. Somebody has to prepare their papers preparing for the stay.

The Court: They are not complaining about it. They got the burden. If they don't do it—in other words—

Mr. Mayer: Let me ask you this—

The Court: —prepared language.

It is hereby ordered the injunction, whatever it is, be stayed until 5 p.m. Friday, February 28th. No additional stay will be granted by this Court, period. That's it.

Mr. Mayer: Your Honor, I would say this: That the charging parties here—and, I grant you, I am not representing them as charging parties—the charging parties, however, who do represent in substantial part the parties or the public interest that is being injured, as well as the [61] remaining of the public interest, would be damaged by the grant of that stay by another five days. You have another five days of a continuing boycott of employers who are engaged in interstate commerce. This does create additional damage. I, frankly, have problems understanding how the Circuit Court is going to hear and consider a motion for a stay pending appeal and our opposition by Friday.

The Court: Well, all I'm trying to do—

Mr. Mayer: I understand you're in a difficult position. I sympathize with your position.

The Court: In the end I'll get up from here and leave. All I'm trying to do—so I'm not in that bad a position. All I'm trying to do is to let the Circuit take a look at what is going on. In effect, I'm trying to say: Look, this is the implementation of what the words of the Circuit mean—has to be done.

I am not really considering the equities. I'm not balancing success on the merits. I'm doing what the literal language requires me to do. That is what you want me to do. That is really what you want me to do in all cases, including this one.

They will do nothing. They will not extend the case. It will go into effect. If, on the other hand, they think maybe they didn't mean that those words should be applied in that way or I misconstrued them, or perhaps there [62] are nuances of situations which admit of different treatment, then, in other words, if they get interested in the

situation, they can extend the stay and take briefs. It merely gives the Circuit an opportunity to take a look at the situation.

Mr. Mayer: I question how that could conceivably be done within now, four days. I see it exactly doing precisely what you don't want to do. That is, to have the yo-yo effect. It is on, it is off, it's on, it is off. I can't conceive of papers being filed—and it will be a substantial submission.

The Court: It is a very simple submission. I don't think it is a very difficult question.

Mr. Mayer: The question is exactly the Rule 65 issues, your Honor. The question is likelihod of success on appeal. Irreparable injury to the two parties and the public interest. It's the identical issues that we suggested to you that you aren't supposed to face here. They would then be required to face those very issues.

The Court: No, they won't. They won't be considering the merits. They will be saying whether or not that's right.

Mr. Mayer: Those are the bases for stay pending appeal, your Honor. That is the rule. Rule 65 applies to motions for stays.

The Court: Well, it may be academic, anyway.

[63] Mr. Mayer: Your Honor, they have the opportunity to seek an emergency appeal and a stay pending appeal from the Third Circuit. If the Third Circuit disagrees with you, they can remedy that very quickly.

The Court: Once again, it's the question of who got the motive or power to move.

Mr. Mayer: Your Honor, that would be my position. You obviously will do what you deem proper.

The Court: I'm trying to do the best I can. A very difficult situation.

I'm not going to be able to please everybody, nor is that the test, anyway.

I'm going to grant you your injunction. I will stay its implementation until Friday at 5 p.m.

On the representation by this Union, one thing is sure, Mr. Gleason. This Court is not hostile, certainly, to many of the concerns that you have expressed. I think you can see that. But once that injunction goes into effect on Friday, it will be followed religiously. We are not going to have any trouble. Friday at 5 p.m., unless the panel or a Judge of the United States Court of Appeals for the Third Circuit stays my order, it will go into effect.

You better get up an order, I think. Do you have the facilities here to do it?

Mr. Mayer: To do what?

[64] The Court: To get an order together.

Mr. Lambos: We can meet with them this afternoon.

Your Honor pointed out earlier you'll not grant them the general blanket injunction that they asked for initially. As I understand it, you are enjoining the application and implementation of the Rules on Containers.

The Court: Is there anything else before me?

Mr. Lambos: Well, the form of injunction that had been presented with the earlier papers just enjoined us from doing any and all things.

The Court: All you want is the implementation on the Rules on Containers?

Mr. Mayer: The implementation of the Rules on Containers and threats or coercion to enforce them.

The Court: Look, they understand, I hope, that once that injunction goes into effect, your recourse is only at law.

Mr. Gleason: I would say this, your Honor: As soon as —if the injunction goes into effect, there is no question

about the injunction being lived up to by the parties. Certainly, we will do everything to live up to the injunction.

The Court: I will have continuing jurisdiction. I tell you, I may have some serious questions about, you know, the applicability of the 10(l), so forth. But I have no [65] question about the fact that once this Court issues an injunction, it is to be followed, obeyed. Nor do I hesitate to vindicate the honor of this Court to make certain it is.

Mr. Gleason: Your Honor, I may point out, also, so there is no misunderstanding, that, originally, when we negotiated, this contract had run out in September, 1980. While we were negotiating, we didn't know where we stood with the Board. We did put a reopening on December the 1st. That's the purpose. When we did sit down to negotiate on December the 1st, that they agreed and the parties agreed that the Rules would go into effect. And since there is now an injunction, it may very well be that the Union somewhere down the line will give notice of reopening of that contract, which certainly they have the right under the contract—

The Court: I'm not going to argue or litigate now. All I'm telling you, Mr. Gleason, is, we have tried to be fair to both sides and considered all of the equities. I have done what I felt I had to do.

If the law—the injunction comes into effect, I just want you to understand irrespective of whatever else you may have thought about my decision, I will fully enforce it. Please understand that. Don't misread me about it.

Is that satisfactory to you?

All right. I think you should get up an order. You're going to get the minutes, so forth, so on. You'll [66] need an order or the Circuit won't hear you anyway. You'll need the order.

Mr. Mayer: We also, your Honor, need an emergency—I mean, an emergency basis.

The Court: He's the greatest emergent transcript preparer in the country.

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APPENDIX D

Constitutional and Statutory Provisions

United States Constitution, Article III, Section 1

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 10(l) of the National Labor Relations Act, 29 U.S.C. §160(l)

(*l*) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (A), (B) or (C) of section 158(b) of this title, or section 158(e) of this title or section 158(b) (7) of this title, the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any United States district court within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it

deems just and proper, notwithstanding any other provision of law: *Provided further,* That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period: *Provided further,* That such officer or regional attorney shall not apply for any restraining order under section 158(b) (7) of this title if a charge against the employer under section 158(a) (2) of this title has been filed and after the preliminary investigation, he has reasonable cause to believe that such charge is true and that a complaint should issue. Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: *Provided further,* That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organization a party to the suit. In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 158(b) (4) (D) of this title.

APPENDIX E

Federal Statutes Authorizing Temporary Injunctions

The following federal statutes expressly authorize the application by an administrative agency or officer for a temporary injunction prior to, and pending, a decision on the merits, by either an administrative agency or a court:

Agricultural Products Producers Associations Act, application by the Secretary of Agriculture. 7 U.S.C. §292.

Agricultural unfair trade practices laws, application by the Secretary of Agriculture. 7 U.S.C. §2305(b).

Alaska Natural Gas Transportation Act of 1976, application by the Attorney General of the United States. 15 U.S.C. §719i(c).

Anti-Trust Acts, application by a United States Attorney under the direction of the Attorney General of the United States 15 U.S.C. §4.

Atomic Energy Act of 1954, application by the Atomic Energy Commission. 42 U.S.C. §2280.

Civil Rights Act of 1957, application by the Attorney General of the United States. 42 U.S.C. §1971(c).

Civil Rights Act of 1964, application by the Attorney General of the United States. 42 U.S.C. §2000a-5(a).

Civil Rights Act of 1964, application by the Attorney General of the United States. 42 U.S.C. §2000e-6(a).

Clayton Act of 1914, application by a United States Attorney under the direction of the Attorney General of the United States or by Federal Trade Commission or Attorney General. 15 U.S.C. §25; 15 U.S.C. §18a(f).

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Federal Statutes Authorizing Temporary Injunctions

Clean Water Act of 1977, application by the Secretary of the Army. 33 U.S.C. §1344(s)(3).

Commodity Exchange Act of 1922, application by the Commodity Futures Trading Commission. 7 U.S.C. §13a-1.

Connelly Hot Oil Act, application by the President of the United States under the direction of the Attorney General of the United States. 15 U.S.C. §§715 (a), (b).

Consumer Products Safety Act of 1972, application by the Attorney General of the United States or Consumer Product Safety Commission. 15 U.S.C. §2071(a).

Credit control laws, application by the Board of Governors of the Federal Reserve System. 12 U.S.C. §1907.

Currency reporting laws, application by the Secretary of the Treasury. 31 U.S.C. §1057.

Deepwater Port Act of 1974, application by the Attorney General of the United States upon request by the Secretary of Transportation. 33 U.S.C. §1514(c).

Electric utility company laws, application by the Federal Power Commission. 16 U.S.C. §825m(a).

Employee Retirement Income Security Act of 1974, application by the Secretary of Labor.
29 U.S.C. §1132(a)2, *et seq.*

Energy Policy and Conservation Act, application by the Attorney General of the United States.
42 U.S.C. §6395(d).

Fair housing laws, application by the Attorney General of the United States. 42 U.S.C. §3613.

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Farm Labor Contractor Registration Act of 1963, application by the Secretary of Labor. 7 U.S.C. §2050a(c).

Federal Election Campaign Act of 1971, application by the Federal Election Commission.
2 U.S.C. §437g(a)(6)(A), *et seq.*

Federal Energy Administration Act of 1974, application by the Attorney General of the United States upon the request of the Federal Energy Administrator.
15 U.S.C. §797 (4).

Financial record keeping laws, application by the Secretary of the Treasury. 12 U.S.C. §1954.

Flammable Fabrics Act, application by the Federal Trade Commission. 15 U.S.C. §1195(a).

Food, Drug and Cosmetic Act, application by the Attorney General of the United States. 21 U.S.C. §332.

Food, Drug and Cosmetic False Advertising Act, application by the Federal Trade Commission. 15 U.S.C. §53.

Foreign Agents Registration Act of 1938, application by the Attorney General of the United States.
22 U.S.C. §618(f).

Foreign Corrupt Practices by Domestic Concerns Act of 1977, application by the Attorney General of the United States. 15 U.S.C. §78dd-2(c).

Fur Products Labeling Act, application by the Federal Trade Commission. 15 U.S.C. §69g(b).

Import trade restraints law, application by the Attorney General of the United States. 15 U.S.C. §9.

Appendix E
Federal Statutes Authorizing Temporary Injunctions

Interstate Land Sales Full Disclosure Act, application by the Secretary of Housing and Urban Development. 15 U.S.C. §1714(a).

Investment Advisor Act of 1940, application by the Securities and Exchange Commission. 15 U.S.C. §80b-9(e).

Investment Company Act of 1940, application by the Securities and Exchange Commission. 15 U.S.C. §80a-41(e).

Law Enforcement Assistance Act, application by the Attorney General of the United States. 42 U.S.C. §3789d(c)(3).

Labeling Act, application by the Federal Trade Commission. 15 U.S.C. §68e(b).

Mail and postal laws, application by the Attorney General of the United States. 39 U.S.C. §3011(c).

Magnuson-Moss Warranty — Federal Trade Commission Improvement Act, application by the Attorney General of the United States or the Federal Trade Commission. 15 U.S.C. §2310(c)(1).

Mineral lands and mining acts, application by the Secretary of the Interior. 30 U.S.C. §818(a)(1).

National Housing Act, application by the Attorney General of the United States. 12 U.S.C. §1731(b)(h).

Natural Gas Policy Act of 1978, application by the President, the Federal Energy Regulatory Commission, the Secretary of Energy, or the Attorney General of the United States. 15 U.S.C. §3414(b), *et seq.*

Natural Gas Act, application by the Federal Trade Commission. 15 U.S.C. §717s(a).

Appendix E
Federal Statutes Authorizing Temporary Injunctions

Packers and Stockyard Act of 1921, application by the Attorney General of the United States upon request of the Secretary of Agriculture. 7 U.S.C. §228(a).

Public Utility Holding Company Act of 1935, application by the Securities and Exchange Commission. 15 U.S.C. §79r(f).

Public health service laws, application by the Secretary of Health, Education and Welfare. 42 U.S.C. §263a(f).

Public lands laws, application by the Attorney General of the United States or a United States Attorney. 43 U.S.C. §1350(a).

Revenue Sharing Act of 1972, application by the Attorney General of the United States. 31 U.S.C. §1342(g).

Securities Act of 1933, application by the Securities and Exchange Commission. 15 U.S.C. §77t.

Securities Exchange Act of 1934, application by the Securities and Exchange Commission. 15 U.S.C. §78u (d).

Textile Fibre Products Identification Act, application by the Federal Trade Commission. 15 U.S.C. §70f.

Voting Rights Act Amendments of 1970, application by the Attorney General of the United States. 42 U.S.C. §1973aa-2.

Voting Rights Act of 1965, application by the Attorney General of the United States. 42 U.S.C. §1973j(d).

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No. 80-2095

In the Supreme Court of the United States

OCTOBER TERM, 1980

NEW YORK SHIPPING ASSOCIATION, INC., ET AL.,
PETITIONERS

v.

WILLIAM A. PASCARELL, ACTING REGIONAL DIRECTOR
OF THE TWENTY-SECOND REGION OF THE
NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly concluded (a) that the Regional Director of the National Labor Relations Board had "reasonable cause to believe" that petitioners were violating the secondary boycott provisions of the National Labor Relations Act by reaffirming and placing into effect the Rules on Containers, and (b) that the issuance of an injunction pursuant to Section 10(*l*) of the Act, 29 U.S.C. 160(*l*), restraining the parties from effectuating that agreement pending the final determination of the unfair labor practice charges by the Board, was "just and proper."

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 650 F.2d 19. The opinion of the district court (Pet. App. 176a-192a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 9a-10a) was entered on May 20, 1981. The petition for a writ of certiorari was filed on June 10, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set forth in the appendix to this brief (*infra*, pages 1a-3a).

STATEMENT

1. This case is the latest stage of the litigation involved in determining whether the Rules on Containers in the collective bargaining agreement between the International Longshoremen's Association ("ILA") and New York Shipping Association ("NYSA") and Council of North Atlantic Shipping Associations ("CONASA")—petitioners here—are a lawful work preservation agreement, or a "hot cargo" or secondary boycott agreement proscribed by Section 8(e) of the National Labor Relations Act, 29 U.S.C. 158(e) ("the Act"). In *NLRB* v. *ILA*, 447 U.S. 490 (1980), this Court, by a 5-4 vote, held that the Board had applied the wrong standard in determining that the Rules on Containers were not a lawful work preservation agreement, and remanded the case to the Board to redetermine that question under the correct standard.[1] The Court emphasized that it is was not deciding "the proper definition of the work in controversy", and that the "question whether the Rules may be sustained under a proper understanding of the work preservation doctrine must be answered first by the Board on remand." *Id.* at

[1] The Court held that the Board had "focused on the work done by the employees of the charging parties, the truckers and consolidators, after the introduction of containerized shipping[,]" instead of focusing on the work of the longshoremen and "examin[ing] the relationship between the work as it existed before the innovation and as the agreement proposes to preserve it." 447 U.S. at 507.

511 n.26. The Court further held that, if the Board finds on remand that the Rules have a lawful work preservation objective, it should then consider the further contentions that the shipping association members did not have the right to control the stuffing and stripping of containers,[2] adding that these contentions "present difficult and complex problems which are not properly before us." *Id.* at 512.

The Rules on Containers were inoperative from 1973 through 1980 as a result of injunctions obtained by the Board and of Board orders that had been enforced by the courts of appeals. On January 2, 1981, with those barriers having been eliminated by this Court's remand in *NLRB* v. *ILA*, *supra*, petitioners once again began to enforce the Rules (J.A. 292-293, 963-964).[3] Unfair labor practice charges were filed with the Board's Regional Director in Newark, New Jersey, by truckers and consolidators, alleging that the reaffirmation and implementation of the Rules violated Section 8(e) and Section 8(b)(4)(A) and (B) of the Act, 29 U.S.C. 158(e) and 158(b)(4)(A) and (B) (J.A. 17-27). The Regional Director found that there was reasonable cause to believe that the charges were meritorious and issued an unfair labor practice complaint (J.A. 28-41). Pursuant to the mandate of Section 10(*l*) of the Act, 29 U.S.C. 160(*l*), the Regional Director petitioned the United States District Court for the District of New Jersey to enjoin petitioners from implementing the rules pending final resolution of the

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[2] See *NLRB* v. *Enterprise Ass'n of Pipefitters*, 429 U.S. 507 (1977).

[3] "J.A." refers to the joint appendix in the court of appeals, a copy of which has been lodged with the Clerk.

unfair labor practice charges by the Board (J.A. 10-15).[4]

2. a. The relevant facts, established by affidavit testimony and documentary evidence submitted to the district court, may be briefly summarized. Prior to the advent of modern containers and container ships,[5] shippers and shippers' agents delivered cargo in break bulk form—*i.e.*, on a piece-by-piece basis—to the head of the pier. Longshoremen employed by steamship companies assembled on pallets and in boxes and crates the individual pieces of cargo received at a pier. They then transported the consolidated cargo loads to the ship, hoisted the loads aboard, disassembled them and separately stowed each piece of cargo in the hold of the ship. Conversely, when longshoremen unloaded a ship, they assembled cargo loads on the ship, hoisted the loads onto the pier and disassembled the loads on the pier. (J.A. 910-912, 946-947.)

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[4] The Board has consolidated the underlying unfair labor practice case, the cases remanded by this Court, and other cases involving the same question for expedited hearing and determination by a single administrative law judge. The hearing before that judge closed on April 7, 1981, briefs were filed by the parties on July 6, 1981, and the matter is now awaiting the judge's decision.

[5] As this Court explained in *NLRB* v. *ILA*, *supra*, 447 U.S. at 494:

> Containers are large, reusable metal receptacles, ranging in length from 20 to 40 feet and capable of carrying upwards of 30,000 pounds of freight, which can be moved on and off an ocean vessel unopened. Container ships are specially designed and constructed to carry the containers, which are affixed to the hold. A container can also be attached to a truck chassis and transported intact to and from the pier like a conventional trailer.

With the advent of modern containers and container ships during the 1960s, a new intermodal transportation system developed. Under this system, a shipper with enough cargo to fill a container obtained an empty container from a steamship company, brought it by rail or truck to its place of business or to a warehouse where it stored its goods, and loaded or stuffed the container, using either its own employees or the warehouse employees. The container was then carried by truck or rail to the pier, where it was then moved onto the pier and subsequently loaded aboard ship by longshoremen, using specially designed equipment. The containers were moved and loaded intact, without any additional handling of the containers' contents by longshoremen. (J.A. 319-320, 334-341, 396, 415-417, 460-461, 498-506, 532, 793-795, 798.)

A shipper who did not have enough cargo to fill a container had the option of delivering the cargo in smaller units to the pier—where it could be handled in that form or stuffed into containers by longshoremen—or of contracting with a consolidator or non-vessel operating common carrier (NVOCC). If the shipper elected to use a NVOCC, the latter, as was the case before the advent of modern containers, arranged for the delivery of the cargo to a warehouse or other off-pier facility, where it was consolidated with other cargo bound for a common destination. After the introduction of modern containers, however, the NVOCC secured containers from the steamship companies and stuffed the consolidated cargo directly into the containers, instead of truck trailers or railroad cars, as before. The containers were then hauled to the pier, where, as with the full container loads of a single shipper, they were handled intact by longshoremen. (*Ibid.*)

The process was reversed with respect to import cargo. However, because of containerization, a practice called "short stopping" developed in the import trade. Thus, even when a container was fully loaded with cargo for a single consignee, it was not always feasible to haul the container directly to the consignee. Accordingly, full containers were frequently "short stopped"—hauled to trucking terminals near the pier, where they were stripped and their cargo transferred, either alone or consolidated with other cargo, into more suitable over-the-road equipment for delivery to the final destination. (J.A. 323-327, 387-393, 591, 596-600, 655-666, 705-709.)

When the shipping companies began offering to make containers available to shippers who booked passage on their ships, they published tariffs prescribing more favorable conditions for shippers of full container loads (FCL or FSL) than for shippers of less than container loads (LCL). NVOCCs could qualify for the more favorable tariff provisions by consolidating their customers' LCL cargo, stuffing it in a container, and themselves becoming the shipper of FCL or FSL cargo. NVOCCs also were able to assume full responsibility for the cargo transported under a single bill of lading issued by them. (J.A. 404, 407, 409, 698-699, 726-728, 847-852, 951-952.)

In addition to offering these cost savings to their customers, NVOCCs offered shippers fewer handling delays and less risk of cargo pilferage and damage, since the step of rehandling the cargo at the pier was eliminated. NVOCCs also offered other significant services that were not obtainable through break bulk loading of containers by longshoremen at the piers. These included arranging for and furnishing space on specific vessels through advance booking ar-

rangements, packing cargo in containers in the sequential order in which it will be delivered, and preparing all necessary documentation and coordinating all phases of the transport of the cargo. (J.A. 331-337, 341, 404, 407, 409-413, 418-420, 423-424, 528-529, 696-700, 713-716, 718-720, 832-836, 952-953.)

Finally, containerization permitted shippers to eliminate cargo handling in American ports through the bill of lading. By designating on the bill of lading that export cargo is to be shipped house-to-pier, and import cargo is to be shipped pier-to-house or house-to-house, the shipper can direct that the container move intact through American ports. (J.A. 830-831, 834, 847-852, 864-904.)

As the number of intact container loads of cargo moving across the piers increased, manhours worked by longshoremen were correspondingly diminished. In 1968, ILA and NYSA placed restrictions on the types of intact container loads to be handled by longshoremen through adoption of the Rules on Containers, and, in 1973, the parties, together with CONASA, added a supplement to promote enforcement of the Rules (J.A. 922-925, 931-935).*

In essence, the Rules apply to all containers owned or leased by steamship companies and provide that, if such containers are to be stuffed or stripped within 50 miles of the port, that work must be done either by the employees of the beneficial owners of the cargo or at the pier by longshoremen employed by

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* The final version of the Rules, which was incorporated in the 1974 collective bargaining agreement, is set forth in the appendix to the Court's opinion in *NLRB* v. *ILA*, *supra*, 447 U.S. at 513-522.

members of NYSA or CONASA.[7] The Rules provide for liquidated damages, presently set at $1000 per container, for any container handled in violation of the Rules.

b. Based on the foregoing facts, the Regional Director contended that the container stuffing and stripping work performed by NVOCCs, trucking companies, and warehouses for their shipper customers was not functionally equivalent to the assembly and disassembly work traditionally performed by longshoremen on the pier as a necessary incident of loading and unloading vessels, but instead was a different work function that had been inextricably integrated into a new and more sophisticated intermodal transportation system. Accordingly, insofar as the Rules sought to claim this stuffing and stripping work for longshoremen, they had an unlawful work acquisition, rather than a lawful work preservation, objective. The Regional Director further contended that, even if the Rules had a valid work preservation objective, they were unlawful as applied, because the steamship companies do not have the legal right to assign the stuffing and stripping work to longshoremen where the shippers' bills of lading direct that the container shall move intact, or to withhold containers from NVOCCs who perform stuffing work within 50 miles of the port.[8]

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[7] The supplement to the Rules carved out an exception permitting the stripping of FSL cargo within 50 miles of the port by other than the beneficial owner's employees, provided the cargo is stripped in a bona fide warehouse and warehoused there for at least 30 days.

[8] See Shipping Act of 1916, 46 U.S.C. (& Supp. III) 801 *et seq.*; Intercoastal Shipping Act of 1933, 46 U.S.C. (& Supp. III) 843 *et seq.*; *Sea-Land Service, Inc., & Gulf*

The district court concluded that the Regional Director's legal theory was "substantial and not frivolous," and thus that there was reasonable cause to believe that unfair labor practices in violation of Sections 8(e) and 8(b)(4)(A) and (B) of the Act, 29 U.S.C. 158(e), 158(b)(4)(A) and (B), were occurring (Pet. App. 189a-191a). The court accordingly granted the Regional Director's request for an injunction prohibiting implementation of the Rules pending a final Board determination of the unfair labor practice charges (Pet. App. 204a).

3. The court of appeals affirmed, holding that the district court had correctly determined, on the basis of the Regional Director's "substantial and not frivolous" legal theory, that there was reasonable cause to believe unfair labor practices were occurring (Pet. App. 7a-8a). The court of appeals further concluded that injunctive relief was "just and proper," explaining (*id.* at 8a): "[W]e cannot hold that the trial court erred in refusing to permit a change in the status quo by authorizing operation of the Rules, and putting the freight consolidators out of business, while the Board hearing went forward."

ARGUMENT

The court below correctly concluded that the Regional Director had reasonable cause to believe that the Rules on Containers violated the secondary boycott provisions of the National Labor Relations Act and that it was just and proper, within the meaning of Section 10(*l*) of the Act, to enjoin their imple-

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Puerto Rico Lines, Inc., & Puerto Rico Maritime Shipping Authority—Proposed ILA Rules on Containers, 20 F.M.C. 788 (1978), review pending, No. 78-1776 (D.C. Cir.).

mentation pending a final Board determination. No issue warranting review by this Court is presented.

1. Section 10(*l*) of the Act, 29 U.S.C. 160(*l*), directs the Board's Regional Directors to apply for injunctive relief in the federal district courts whenever the Directors determine that there is reasonable cause to believe that certain unfair labor practices—most notably secondary boycotts and hot cargo agreements—have occurred. The action for an injunction under Section 10(*l*) is ancillary to the unfair labor practice proceeding before the Board. The injunction expires when the Board renders its final decision on the underlying unfair labor practice charge. See 29 U.S.C. 160(*l*); *Sears, Roebuck & Co.* v. *Carpet Layers*, 397 U.S. 655 (1970). Accordingly, in a proceeding for an injunction under Section 10(*l*), the court's inquiry is narrow:

> [T]he district court is not called upon to decide whether, in fact, a violation has occurred. The determination of this question is reserved exclusively for the Board with review by the Court of Appeals under section 10(e) and (f) of the Act. The inquiry of the district court is limited to a determination of whether the Board ha[s] reasonable cause to believe the Act was being violated as charged, and if it so concludes, it must grant such relief as it deems just and proper.

Wilson v. *Milk Drivers & Dairy Employees Union, Local 471*, 491 F.2d 200, 203 (8th Cir. 1974).

2. a. Petitioners contend (Pet. 8-11) that there is a conflict among the courts of appeals as to the standard to be applied in determining whether the Regional Director has established that there is reasonable cause to believe that a violation of the Act

has occurred. Petitioners assert (Pet. 9) that, in the Third, Fifth, Seventh, Eighth and Ninth Circuits, the reasonable cause standard is met where the legal theory on which the Regional Director proceeds is substantial and not frivolous. *Consolidated Express, Inc.* v. *New York Shipping Association*, 641 F.2d 90, 95 (3d Cir. 1981) and cases there cited; *Boire* v. *International Brotherhood of Teamsters*, 479 F.2d 778, 789-791 (5th Cir. 1973); *Squillacote* v. *Graphic Arts International Union*, 540 F.2d 853, 858 (7th Cir. 1976); *Hendrix* v. *Operating Engineers, Local 571*, 592 F.2d 437, 442 (8th Cir. 1979); *Kennedy* v. *Los Angeles Typographical Union, No. 174*, 418 F.2d 6, 8 (9th Cir. 1969). On the other hand, in the Second and Fourth Circuits, the reasonable cause standard is held to require a showing of "at least some significant possibility that the Board will enter an enforceable order" (*Danielson* v. *Joint Board of Coat, Suit, & Allied Garment Workers*, 494 F.2d 1230, 1244-1245 (2d Cir. 1974)), and an injunction is deemed unwarranted if the district court "is convinced that the [Regional Director's] legal position is wrong" (*Humphrey* v. *ILA*, 548 F.2d 494, 497-498 (4th Cir. 1977).[9] Even if there is a difference be-

[9] Contrary to petitioners' contention (Pet. 9), no "fourway split in the circuits has developed." In construing the reasonable cause standard, the First Circuit has held that the Regional Director's legal theory should be accepted if it is "not without substance." *Union De Tronquistas, Local 901* v. *Arlook*, 586 F.2d 872, 876 (1978), citing with approval, *Hirsch* v. *Bldg. & Constr. Trades Council of Philadelphia*, 530 F.2d 298 (3d Cir. 1976) (where the court applied the "substantial and not frivolous" standard). The Sixth and Tenth Circuits have applied the reasonable cause standard with no elaboration. See, *e.g.*, *AFTRA* v. *Getreu*, 258 F.2d 698, 699 (6th Cir. 1958); *Lawrence Typographical*

tween the two standards, however, there is no need for this Court to determine in this case which standard is correct. For, as we show below, it cannot be said that the Regional Director's legal position is clearly "wrong" or that there is no "significant possibility that the Board will enter an enforceable order." [10] Therefore, even under the Second and Fourth Circuits' allegedly more stringent reasonable cause standard, an injunction would have issued here.[11]

Union No. 570 v. *Sperry*, 356 F.2d 58 (10th Cir. 1966). The District of Columbia Circuit has not addressed the issue.

[10] Question 1 stated in the petition is inaccurate insofar as it suggests that the district court was required to issue an injunction here even though it had determined that "the basic theory advanced by the Regional Director is erroneous." The district court refrained from making that determination, recognizing that the "ultimate resolution of questions of fact and law is explicitly left to the Board" (Pet. App. 185a).

[11] Thus, in *Danielson* v. *Joint Board, supra*, the Second Circuit refused to sustain the issuance of an injunction under Section 10(*l*) upon finding that the General Counsel's legal theory was "a strained and wholly unnatural construction" of the Act which produced a result that Members of Congress "had [been] assured [by Senator Taft] was not intended by the secondary boycott provisions" of the Act (494 F.2d at 1237). Cf. *Danielson* v. *International Organization of Masters, Mates & Pilots*, 521 F.2d 747, 751 (2d Cir. 1975) ("In determining whether an injunction under § 10(*l*) should issue, it is well settled that the district court need not decide that an unfair labor practice has actually occurred but merely must decide whether the Board has reasonable cause to believe there has been a violation of the Act.").

In *Humphrey* v. *ILA*, *supra*, the Fourth Circuit noted (548 F.2d at 498) that, "while a temporary injunction should not issue unless there is some reasonable possibility that the Board will ultimately enter an enforceable order, the General Counsel's resolution of disputed issues of law and fact should

b. As shown (pages 4-8, *supra*), the Regional Director adduced evidence before the district court showing that, as a result of technological changes spawned by containerization, the assembly and disassembly work traditionally performed by longshoremen on the pier as a necessary incident of loading and unloading vessels had been replaced by a significantly different work function—container stuffing and stripping performed by NVOCCS, trucking companies, and warehouses as an integral and inseparable part of a new and more sophisticated intermodal transportation system. The Regional Director contended that, in these circumstances, the Rules on Containers—by claiming for longshoremen container stuffing and stripping work that could not be separated out without impairing the new integrated transportation system—represent not an effort to preserve work traditionally performed by longshoremen, but instead an attempt to acquire for longshoremen work that had not previously been theirs. Far from being patently erroneous, this legal theory—*i.e.*, that an attempt to acquire "new work" evidences an unlawful secondary objective—has been accepted by at least two courts of appeals. See *Carrier Air Conditioning Co.* v *NLRB*, 547 F.2d 1178, 1187 (2d Cir. 1976); *Associated General Contractors* v. *NLRB*, 514 F.2d 433, 438 (9th Cir. 1975). See also *NLRB* v. *Enterprise Ass'n of Pipefitters*, *supra*, 429 U.S. at 529-530 n.16; *National Woodwork Manufacturers Ass'n* v. *NLRB*, 386 U.S.

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be accorded considerable deference in determining whether such possibility exists." Applying this standard, the court concluded that the General Counsel had established reasonable cause to believe that the same Rules on Containers involved here were violative of the Act and that an injunction should issue under Section 10(*l*). *Id.* at 500.

612, 648 (1967) (Harlan, J., concurring). Indeed, this Court, in remanding the container issue to the Board, noted that one of the questions to be considered by the Board was the validity of the argument—advanced by the truckers and consolidators—that "containerization has worked such fundamental changes in the industry that the work formerly done at the pier by both longshoremen and employees of motor carriers has been completely eliminated." *NLRB* v. *ILA*, *supra*, 447 U.S. at 510-511.

The Regional Director further contended, on the basis of evidentiary submissions (see pages 7, 8 & note 8, *supra*), that, even if the Rules on Containers had a lawful work preservation objective, they nonetheless were applied in an unlawful manner insofar as they sought to acquire for longshoremen container work that the steamship companies, because of the shippers' bills of lading and the requirements of the Shipping Act, do not have the legal right to control. This alternative theory of why the Rules violate the secondary boycott provisions of the Act likewise cannot be said to be an impermissible interpretation of the statute in the light of this Court's decision in *Pipefitters*, approving the Board's right-to-control test, and the Court's recognition in *NLRB* v. *ILA*, *supra*, 447 U.S. at 511-512, that the application of that test to the situation here "present[s] difficult and complex problems" that the Board should consider on the remand.

3. Contrary to petitioners' contention (Pet. 11-13), the court below correctly concluded that the injunctive relief granted by the district court was "just and proper" in the circumstances of this case to terminate the probable unfair labor practices and to preserve the status quo pending Board adjudication of the unfair labor practice complaint.

Section 10(*l*) of the Act embodies the determination of Congress that certain unfair labor practices, particularly secondary boycotts and hot cargo agreements, are so harmful to the public welfare and engender such serious interruptions of commerce that their discontinuance, pending final adjudication by the Board, is essential to avert irreparable injury to the policies of the Act. See S. Rep. No. 105, 80th Cong., 1st Sess. 8, 27 (1947); I NLRB, *Legislative History of the Labor Management Relations Act, 1947*, at 414, 433 (1948). Because the Board's Regional Directors seek injunctive relief "acting in the public interest and not in vindication of purely private rights" (S. Rep. No. 105, *supra*, at 8, I *Legislative History*, *supra*, at 414), "[t]he propriety of injunctive relief" under the "just and proper" standard "does not depend upon traditional equitable principles, but [on] whether it is necessary to effectuate policy as announced by Congress. It is just and proper when the circumstances of a case create a reasonable apprehension that the statutory remedial purposes will be frustrated in the absence of such relief." *Wilson* v. *Milk Drivers & Dairy Employees Union, Local 471*, *supra*, 491 F.2d at 203. Accord: *Hendrix* v. *Operating Engineers, Local 571*, 592 F.2d 437, 443 (8th Cir. 1979); *Union De Tronquistas, Local 901* v. *Arlook*, 586 F.2d 872, 877-878 (1st Cir. 1978); *Squillacote* v. *International Brotherhood of Teamsters, Local 344*, 561 F.2d 31, 35 (7th Cir. 1977); *Henderson* v. *Operating Engineers, Local 701*, 420 F.2d 802, 808 (9th Cir. 1969). See also *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 609-610 (1952) (Frankfurter, J., concurring) ("When Congress itself has struck the balance, has defined the weight to be given the competing interests, a court

of equity is not justified in ignoring that pronouncement under the guise of exercising equitable discretion.").[12]

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[12] Notwithstanding petitioners' assertion (Pet. 11-12) that "[a]ll the circuits" apply the "just and proper" standard as a "separate and distinct test" based upon "traditional equitable principles," petitioners do not cite a single case in which a court of appeals affirmed the denial of 10(*l*) injunctive relief on equitable grounds where, as here, there was reasonable cause to believe an unfair labor practice was occurring and was likely to continue if not enjoined.

Thus, in both *Squillacote* v. *Graphic Arts International Union*, 540 F.2d 853, 859 (7th Cir. 1976), and *Hendrix* v. *Operating Engineers, Local 571*, 592 F.2d 437, 443 (8th Cir. 1979), the courts, although speaking in terms of equitable discretion, made plain that the overriding consideration in determining whether a 10(*l*) injunction was "just and proper" was the injury to the public that would result from permitting a secondary boycott, which the Regional Director has reasonable cause to believe was illegal, to continue pending a final Board determination. In *Danielson* v. *IBEW, Local 501*, 509 F.2d 1371, 1374-1376 (2d Cir. 1975), the court found that a 10(*l*) injunction was not warranted in circumstances where the Regional Director had waited some five weeks before appealing the district court's finding of lack of reasonable cause to believe that a violation of the Act had occurred, and the construction projects with which the union was allegedly interfering had been completed. (Cf. Pet. App. 8a, where the court below recognized that the district court could "decline an injunction when there was no actual threat that the unfair labor practice charged before the Board was likely to continue pendente lite.") Finally, *Boire* v. *International Brotherhood of Teamsters*, 479 F.2d 778, 788-789 (5th Cir. 1973), involved the standards for granting injunctive relief under Section 10(j) of the Act, 29 U.S.C. 160(j), where the courts may have a greater degree of discretion in determining whether an injunction would be "just and proper" than they have under Section 10(*l*). See *Eisenberg* v. *Hartz Mountain Corp.*, 519 F.2d 138, 143 n.5 (3d Cir. 1975); *Squillacote* v. *Local 248, Meat & Allied Food Workers*, 534 F.2d 735, 743-744 (7th Cir. 1976).

The court below found that the Regional Director had reasonable cause to believe that petitioners' reaffirmation and implementation of the Rules on Containers were violative of the Act, and that their implementation would "drastically alter" the status quo and disrupt commerce by "depriving the freight consolidators and their employees of business they had enjoyed for years" (Pet. App. 6a, 8a). It thus properly concluded that an injunction against implementation of the Rules, pending final Board action, was "just and proper" to effectuate the policies of the Act.[13]

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[13] Because the court of appeals found that the Regional Director had satisfied the statutory requirements for Section 10(*l*) relief, it did not, as petitioners contend (Pet. 13-14), abdicate the powers conferred on it by Article III of the Constitution. By according deference to the Regional Director's legal theory, which it found to be "substantial" (Pet. App. 7a-8a), the court below exercised a judicial function similar to that performed by appellate courts in reviewing final Board orders under Sections 10(e) and 10(f) of the Act, since in such cases they often defer to Board interpretations of the statute that they find are reasonable. See *Ford Motor Co.* v. *NLRB*, 441 U.S. 488, 497 (1979). By finding that the injunction granted by the district court was "just and proper" to preserve the status quo and prevent interruptions to commerce, the court below applied a standard that Congress could constitutionally establish as a basis for obtaining injunctive relief.

Finally, there is no merit to petitioners' contention (Pet. 16) that the district court lacked jurisdiction to grant 10(*l*) relief in this case because "[a] district court is divested of § 10(*l*) jurisdiction when a controversy has been presented to an appellate court." The predicate for Section 10(*l*) jurisdiction in this case was the petition filed by the Regional Director based on new charges alleging as unfair labor practices conduct which occurred in December 1980 and January 1981—subsequent to the appellate court orders remanding to the Board the earlier cases involving the Rules on Containers. Moreover, as the court below correctly observed

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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(Pet. App. 6a-7a), although appellate courts might have the power to enforce Board orders pending remand to the Board (see 28 U.S.C. 1651), where, as here, the Board orders have been vacated, the predicate for *exclusive* jurisdiction under Sections 10(e) and 10(f) has been removed. Thus, the district court's jurisdiction to grant 10(*l*) relief pending Board adjudication, on remand, is not preempted. *Great Western Broadcasting Corp.* v. *Hoffman*, 214 F. Supp. 173 (N.D. Cal. 1963), relied on by petitioners (Pet. 15-16), is not to the contrary. There, the court's holding that it lacked jurisdiction to entertain a Section 10(*l*) petition in connection with a case remanded to the Board by the Ninth Circuit was based on its determination that the court of appeals had "retained jurisdiction of that action, with the remand order affecting only particular portions of the cause." 214 F. Supp. at 177 (citation omitted).

APPENDIX

The relevant provisions of the National Labor Relations Act (29 U.S.C. 151 *et seq.*) are as follows:

1. Section 8(b), 29 U.S.C. 158(b):

It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

(A) forcing or requiring any employer or self-employed person * * * to enter into any agreement which is prohibited by subsection (e) of this section;

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person * * * *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing; * * *.

2. Section 8(e), 29 U.S.C. 158(e):

It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void:
* * *

3. Section 10(*l*), 29 U.S.C. 160(*l*):

Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph 4(A), (B), or (C) of section 158(b) of this title, or section 158(e) of this title or section 158(b)(7) of this title, the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall on behalf of the Board, petition any United States district court within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon

the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law * * *.

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No. 80-2095

In the Supreme Court of the United States

October Term, 1980

NEW YORK SHIPPING ASSOCIATION, INC., COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, ATLANTIC COAST DISTRICT, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,
Petitioners,

vs.

WILLIAM A. PASCARELL, Acting Director of the Twenty-Second Region of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, BRIEF AMICUS CURIAE IN OPPOSITION

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No. 80-2095

In the Supreme Court of the United States

October Term, 1980

NEW YORK SHIPPING ASSOCIATION, INC., COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, ATLANTIC COAST DISTRICT, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,
Petitioners,

VS.

WILLIAM A. PASCARELL, Acting Director of the Twenty-Second Region of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, BRIEF AMICUS CURIAE IN OPPOSITION

Amicus curiae, American Trucking Associations, Inc. ("ATA"), charging party before the National Labor Relations Board in this case, respectfully requests this Court to deny the Petition for a Writ of Certiorari seeking review of the opinion of the Court of Appeals for Third Circuit. Petitioners' and Respondent's letters of consent to ATA's *amicus* status are on file with the clerk of this Court.

OPINIONS BELOW

The opinion and judgment of the Court of Appeals, not yet reported, appear as Appendices A and B in the Petitioners' Appendix to Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit. ("App. A" and "App. B")[1]

Petitioners' Appendix also includes as Appendix C the transcripts of the January 5, January 12, and February 23, 1981, hearings before the Honorable Judge Herbert J. Stern of the United States District Court for the District of New Jersey.[2] Judge Stern's order granting the preliminary injunction, rendered orally on February 23, 1981, is included in Appendix C. (App. C at 176a-191a)

STATUTES INVOLVED

Section 10(l) of the National Labor Relations Act ("Act"), 29 U.S.C. §160(l). (App. D at 207a-208a)[3]

United States Constitution, Article I, Section 8. (*Amicus* App. A)

United States Constitution, Article III, Section 1. (App. D at 207a)

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1. References to the transcripts are hereinafter cited as "App. ..... at ....."

2. On January 5, 1981, Judge Stern denied a temporary restraining order. This decision had no bearing on the Third Circuit appeal. Contrary to Petitioners' assertion, Judge Stern's remarks to counsel on January 5 and 12, and on February 23 prior to rendering his opinion, do not constitute part of the decision reviewed by the Third Circuit and are not material to Petitioners' request for a writ of certiorari.

3. Petitioners' Appendix D contains two of the three statutory and constitutional provisions involved in this case.

STATEMENT OF THE CASE

Nature of the Case

This case arises from a statutory proceeding under §10(l) of the Act. Section 10(l) requires the General Counsel of the National Labor Relations Board, after investigating an unfair labor charge alleging conduct unlawful under §§8(b)(4) or 8(e) of the Act and after concluding that reasonable cause exists to believe the charge is true, to petition a United States district court for injunctive relief from the actions of the Petitioners pending the Board's final disposition of the charges. Section 10(l) authorizes district courts to issue such relief.

Petitioners seek to have reviewed the question whether the district court erroneously granted the injunction based allegedly merely on the representation by the General Counsel of a not "frivolous and insubstantial" legal theory despite the fact that the court determined the legal theory to be erroneous. (Pet. Question 1) However, both the district court and the court of appeals merely found that based on an evaluation of the evidence presented to the court, the General Counsel had reasonable cause to believe a violation was occurring. (App. C at 185a, 189a, 191a; App. A at 7a) Therefore, the true nature of the petition is simply a request that this Court review the appropriateness of the findings below and the issuance of the injunction.

Background of the Case

ATA, the International Association of Non-Vessel Operating Common Carriers ("NVOCCs"), and Twin Express, Inc. each filed unfair labor practice charges on or about December 19, 1980, alleging that Petitioners had violated §§8(b)(4)(i) and (ii)(A) and (B) and 8(e) by entering into, on December 6, 1980, the International Long-

shoremen's Associations ("ILA") Rules on Containers ("Rules") as a consequence of ILA threats and coercion. The Rules seek to secure for ILA labor the work of stuffing and stripping containers originating from or destined to points within 50 miles of seaports on the Atlantic and Gulf coasts.[4]

Petitioners enforced the Rules beginning January 1, 1981. (JA 8l.; 8m. at 446; 8i. at 341; 8u. at 655-56)[5] Having investigated the December, 1980 charges the General Counsel of the Board concluded that the Rules unlawfully sought work neither functionally nor historically related to traditional ILA work. The General Counsel also concluded that the neutral employers of ILA labor could not legally assign the sought-after work to their ILA represented employees. (App. C at 132a and 173a-174a)

On January 5, 1981, the General Counsel petitioned the United States District Court for the District of New Jersey for a temporary restraining order and injunction under Section 10(l) prohibiting enforcement of the Rules. Judge Stern denied the requested temporary restraining order that same day. On January 12, 1981, after hearing arguments by the parties, the court ordered the parties to submit affidavit evidence and briefs so that it could determine whether a preliminary injunction should issue, and if so, in what form.

The parties submitted to Judge Stern affidavit evidence and briefs. (JA 8a.-9 l.) On February 23, 1981,

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4. This Court previously considered the Rules in *NLRB v. ILA*, 447 U.S. 490 (1980). This Court remanded to the Board two consolidated cases, *Associated Transport, Inc.*, and *Dolphin Forwarding, Inc.*, for consideration of precisely the same legal theories which the General Counsel advanced before Judge Stern.

5. "JA" refers to the Joint Appendix in the Third Circuit proceedings.

Judge Stern heard final arguments from the parties before reading his prepared opinion from the bench. (App. C at 158a and 176a-191a)[6] He held that the General Counsel had presented facts and a substantial and not frivolous legal theory which provided reasonable cause for him to believe Petitioners had and were violating the secondary boycott provisions of the Act. (App. C at 185a, 189a, 191a) He issued an injunction prohibiting enforcement of the Rules which became effective February 27, 1981.

Petitioners' request that the Court of Appeals for the Third Circuit stay the injunction was denied on March 7, 1981. The Third Circuit granted expedited consideration of the Petitioners' appeal, and on May 20, 1981, affirmed Judge Stern's decision. (App. A) The Court of Appeals concluded that the district court had jurisdiction to entertain the Board's §10(l) petition, notwithstanding that some of the prior cases had been appealed to and were later remanded by the court of appeals. (App. A at 6a-7a) The court agreed that the General Counsel had reasonable cause to believe a violation existed. (App. A at 7a-8a) The court also concluded that the phrase "just and proper" in §10(l) would permit denial of an injunction

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6. Between the January 12 and February 23, 1981 hearings the Board, pursuant to orders dated January 19, February 18 and February 20, 1981, had consolidated and ordered expedited consideration of the December, 1980 charges and eight other Rules cases already pending before the Board. *International Longshoremen's Ass'n (Dolphin Forwarding, Inc.)*, 236 N.L.R.B. 525 (1978); *International Longshoremen's Ass'n (Associated Transport, Inc.)*, 231 N.L.R.B. 351 (1977); *International Longshoremen's Ass'n, Local 1408 (Puerto Rico Marine Management, Inc.)*, 245 N.L.R.B. No. 171 (1979); *International Longshoremen's Ass'n (Consolidated Express, Inc.)* 221 N.L.R.B. 956 (1975) ("*Conex*"); *International Longshoremen's Ass'n (The Terminal Corp.)*, 250 N.L.R.B. No. 4 (1980); *International Longshoremen's Ass'n (Hill Creek Farms, Inc.)*, Case No. 4-CC-1133, 4-CE-55 (1980); *International Longshoremen's Ass'n, Local 1416 (Custom Brokers & Forwarders Ass'n of Miami Beach, Inc..)*, Case No. 12-CE-30 (1980); and *International Longshoremen's Ass'n, Local 1359 (Beck Arabia, Ltd.)*, 245 N.L.R.B. No. 172 (1979).

if there existed no actual threat that the unfair labor practice charged before the Board would continue, but that the instant case did not present such a situation. (App. A at 8a)

REASONS WHY THE WRIT SHOULD BE DENIED

1. The Instant Case Does Not Involve Petitioners' Questions Nos. 1 and 2

Petitioners' Question No. 1 assumes that in the instant case the General Counsel presented only a theory of law, and that Judge Stern found that theory erroneous. Question No. 2 assumes that the Third Circuit in this case required "automatic" issuance of a §10(1) injunction without considering whether the requested relief was "just and proper." Neither assumption is true; the instant case raises neither question.

The General Counsel submitted to Judge Stern 600 pages of affidavit evidence developed in an extensive investigation following the Court's decision in *NLRB v. ILA*, *supra*. (JA 8a.-8 ll.) To this evidence the General Counsel applied the right of control and work preservation legal theories which the Court had instructed the Board to consider on remand. Judge Stern expressly found neither theory erroneous. In his opinion he reasoned:

> The heart of the dispute before me today does not concern, really, the ultimate outcome of the controversy. This Court . . . is not being called upon to decide whether the union is right that it is work preservation or the charging parties are right that it is work acquisition. That is certainly not at stake. (App. C at 183a)

After considering the evidence and arguments Judge Stern held that the history of the litigation and the record:

> amply demonstrate that counsel for the Board is quite correct, that the position of the charging parties is certainly not unreasonable and non-frivolous. (App. C at 191a)

Moreover, the Judge believed that:

> the issues presented . . . for decision by the Board, can go either way; that both parties' positions are reasonable and non-frivolous. (App. C at 182a; 190a)

He clearly did not find a lack of evidence to support the petition or that the General Counsel's legal theory would not prevail before the Board.

Likewise, contrary to the suggestion of Question No. 2, in its opinion below the Third Circuit did not require automatic issuance of §10(l) relief without considering whether such relief was just and proper. Rather, the court cited one application of that phrase, a district court could decline an injunction if no threat existed that the unfair labor practice charged before the Board would continue. (App. A at 8a) The Third Circuit never stated or implied that this circumstance constituted the "only circumstance" where a district court could properly apply the just and proper standard. (Pet. at 12, n. 12)

The facts assumed by Questions No's. 1 and 2 simply do not exist in the instant case, so these issues should not be reviewed by the Supreme Court.

2. The Various Circuits of the Court of Appeals Have Interpreted §10(l) Consistently

There is no split in the circuits on the interpretations of Section 10(l). The section requires the General Counsel to petition for injunctive relief if he has "reasonable cause" to believe a charge alleging a violation of the Act's

secondary boycott provisions is true. Upon the filing of such a petition a district court has jurisdiction to grant "such injunctive relief . . . as it deems just and proper." (App. D at 207a-208a) The statute was designed to require courts to defer analysis and decision on the merits of the alleged violation to the Board if it appears a violation might exist rather than to judicially decide the merits. All circuits of the court of appeals which have interpreted §10(l) have practiced such a deferred policy.

There is likewise no serious conflict between circuits as to the mandate of §10(l) or the criteria required for the issuance of an injunction. Petitioners have simply conjured a "four-way split among the circuits" as to the standards for an injunction (Pet. at 11) by emphasizing the semantic differences in words used by various circuits and ignoring the action of the courts.

a. Reasonable Cause Criteria

Under the Third Circuit's interpretation of the "reasonable cause" requirement, the agent acting on behalf of the General Counsel must:

> demonstrate that he has reasonable cause to believe that the elements of an unfair labor practice are present and that the legal theory upon which he proceeds is 'substantial and not frivolous.' (Citations omitted)
>
> *Hirsch v. Building and Construction Trades Council*, 530 F.2d 293, 302-303 (3rd Cir. 1976).

This "substantial and not frivolous" standard requires a showing that the theory is " 'within the range of rationality,' and may well be sustained by the Board. (Citations omitted.)" *Squillacote v. Graphic Arts International Union*, 540 F.2d 853, 859 (7th Cir. 1976). Petitioners agree

that the Fifth,[7] Seventh, Eighth and Ninth Circuits concur entirely in the Third Circuit's view of §10(l)'s reasonable cause requirement. (Pet. at 9)

The cases relied on by the Petitioners demonstrate that the approach of other circuits differs only in the words they use in requiring both deference to the Board's expertise and the exercise of judicial power. The First, Second, Fourth, Sixth and Tenth Circuits all approach §10(l) proceedings with great deference to the General Counsel's factual and legal position. In *Humphrey v. International Longshoremen's Association*, 548 F.2d 494, 498 (4th Cir. 1977), the Fourth Circuit in 1977 granted injunctive relief prohibiting enforcement of the ILA's Rules. It required only a "reasonable possibility that the Board will ultimately enter an enforceable order." 548 F.2d at 498. The court admonished that "the function of the district court is not to decide the merits of the case but to determine whether the Regional Director has reasonable cause to believe that the respondents are violating the Act. (Citations omitted.)" 548 F.2d at 498. It further instructed that "the General Counsel's resolution of disputed issues of law and fact should be accorded considerable deference in determining whether such possibility exists." 548 F.2d at 498.

Likewise, in *Kaynard v. Palby Lingerie, Inc.*, 625 F.2d 1047, 1051 (2d Cir. 1980), the Second Circuit affirmed issuance of injunctive relief, stating the following as a governing principle:

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7. The Fifth Circuit accepted the Third Circuit's standard in *Boire v. International Brotherhood of Teamsters*, 479 F.2d 778, 789 (5th Cir.), *reh. denied*, 480 F.2d 924 (5th Cir. 1973). It did not change its view in *Baldovin v. International Longshoremen's Association*, 626 F.2d 445, 454 (5th Cir. 1980), where it simply found that the Board lacked jurisdiction of the dispute because the activities complained of did not affect commerce. Rather, in *Baldovin* the court cited *Boire* with approval. 625 F.2d at 454.

> With respect to issues of fact, the Regional Director "should be given the benefit of the doubt," (Citations omitted), and on questions of law, the Board's view should be sustained unless the court is convinced that it is wrong. (Citations omitted.)

In *Danielson v. Joint Bd. of Coat, Suit & Allied Garment Workers,* 494 F.2d 1230, 1245 (2d Cir. 1974) the Second Circuit stated that in a §10(1) proceedings a district court must be "hospitable" to the Board on both the facts and the law, and only deny injunctive relief if the court is "convinced" that the General Counsel's legal position is wrong.[8]

The Third Circuit did not in this case nor has it in any case held that a district court must always issue an injunction despite being convinced that the General Counsel's legal theory is erroneous. In *Samoff v. Building and Const. Trades Council,* 475 F.2d 203, 207 (3rd Cir.), *vacated and remanded with instructions to dismiss as moot, Building & Const. Trades Council v. Samoff,* 414 U.S. 808 (1973), the court held that having found the Board's legal theory *"thoughtfully presented and not frivolous"* a district court

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8. The Court made it clear that because the General Counsel's theory was being advanced for the first time in the 14-year history of the Act and ran counter to previous Board cases on the subject matter, it would not enforce the Board's order if it found a violation on the basis of the facts and legal theories presented in the 10(1) proceedings. 494 F.2d at 1239, 1245. Notwithstanding a failure to expressly adapt the insubstantial and non-frivolous test, it is apparent that the court applied this or a similar standard in denying the injunction. The Second Circuit in *Danielson* expressed disagreement with *Samoff.* However, Petitioners' inability to cite a single case since *Samoff* in which the Third Circuit has required issuance of an injunction in the face of a district court judgment finding the Board's legal theory erroneous demonstrates that the Third Circuit standard does not accord the excessive deference which the Second Circuit anticipated. Even assuming *arguendo* that the Second Circuit standard is a shade more strict, it is irrelevant to the instant case because neither Judge Stern nor the Third Circuit concluded the General Counsel's legal theory was wrong.

could not deny an injunction simply because it ultimately disagreed with the theory. (Emphasis added.) The Third Circuit cautioned, however, that its ruling "[did] not mean that a district court must always grant an injunction even though it disagrees with the Board's legal theory." 475 F.2d 207. Obviously if the court was convinced that the General Counsel's legal theory was wrong it would not find the theory to be substantial and not frivolous in the first place.

Finally, the First, Sixth and Tenth Circuits also take the Third Circuit's approach to §10(l). *Union de Tronquistas de Puerto Rico v. Arlook*, 586 F.2d 872, 876 (1st Cir. 1978) (Legal theories "must not be without substance." (Citing the Third Circuit's opinion in *Hirsch*, 530 F.2d at 302)); *AFTRA v. Getreu*, 258 F.2d 698, 701 (6th Cir. 1958) (Reasonable cause required, but courts "cannot, and should not try to, usurp the function and duty of the Board. Nor should [they] endeavor to speculate on the law or facts which may eventually underlie the Board's decision. (Citing *Douds v. Milk Drivers and Dairy Employees Union*, 248 F.2d 534, 538 (2d Cir. 1957))"); and *Angle v. Sacks*, 382 F.2d 655 (10th Cir. 1967) (General Counsel must have probable cause to believe a violation of the Act exists.)

b. Just and Proper Criteria

The Third Circuit has always recognized district court authority to tailor "just and proper" injunctive relief to effectuate the purposes of the Act. *Schauffler v. Local 1291, International Longshoremen's Association*, 292 F.2d 182, 186, n. 4 (3rd Cir. 1962). In the instant case the Third Circuit noted the "drastic" alteration in the status quo and the virtual elimination of freight consolidators which enforcement of the Rules would cause. It even recognized equitable circumstances which although not present in

the instant case, would justify denying an injunction. (App. A at 8a) The Third Circuit has never directed district courts "to disregard equitable considerations in the §10(l) setting," nor ruled that "if the district court finds 'reasonable cause,' the issuance of the injunction is automatically 'just and proper'." (Pet. at 12) Petitioners cite no Third Circuit precedent in support of their assertions.

There is no real and tangible conflict in the circuits over the scope of a district court's power to issue a "just and proper" injunction. No circuit holds that a district court before issuing §10(l) relief may review *de novo* the traditional equitable considerations already balanced by Congress in enacting §10(l). Even in *Danielson v. Jt. Bd. of Coat, Suit & Allied Garment Workers, supra*, the Second Circuit made it clear that there was no major distinction between the role of the court in determining if there existed a "reasonable cause to believe" a violation was occurring and if it was "just and proper" to issue an injunction, except for purposes of the standard of appellate review. The Court simply held that in one of those phrases existed "the principle of requiring a showing, perhaps of not of probability of success but at least of some significant possibility that the Board will enter an enforceable order, or on both." 494 F.2d at 1244. Judge Stern recognized below that both the General Counsel and the Respondents could meet this test. Therefore, even under the Second Circuit's standards for an injunction Judge Stern's injunction is proper.

Congress intended to prevent interference to the free flow of commerce by a §10(l) injunction until the Board ruled on the merits of the dispute despite the equitable positions of the private parties. However, the courts were charged to exercise their equitable power to effectuate the policies of the Act when issuing the injunction. For ex-

ample, in *Union de Tronquistas de Puerto Rico v. Arlook*, 586 F.2d at 878 it was held:

> "In determining whether such relief is 'just and proper,' the court is concerned principally, not with the protection of private interests from irreparable injury, but rather with effectuating the policies of the Act. (Citations omitted.) Thus, the claim that the evidence would not support a finding of irreparable harm to Andino is largely beside the point."

In *Hendrix v. International Union of Operating Engineers, Local 571*, 592 F.2d 437, 445 (8th Cir. 1979) enjoining picketing for all purposes was held to be overly broad. In *Kaynard v. Local 282, Teamsters*, 576 F.2d 471, 478 (2d Cir. 1978) the injunction was issued on basis of reasonable cause without traditional balancing of the equities. *See also, Kennedy v. Los Angeles Typographical Union No. 174*, 418 F.2d 6 (9th Cir. 1969) wherein an injunction was granted as requested without traditional balancing of the equities. In *Retail Clerks Union v. Food Employers Council, Inc.*, 351 F.2d 525, 531 (9th Cir. 1965) it was held that an injunction was the best method for avoiding disruption of commerce. Likewise, in *Humphrey v. International Longshoremen's Association*, 548 F.2d 494 (4th Cir. 1977), the injunction was found to be the best method for avoiding the disruption caused by Rules.

Other than *Danielson v. International Brotherhood of Electrical Workers, Local Union No. 501*, 509 F.2d 1371 (2d Cir. 1975), Petitioners cite no case in which a court has actually denied injunctive relief on equitable grounds. Even in that case the Court did not apply the standards of Rule 65 of the Federal Rules of Civil Procedure, which Petitioners have urged should have been done below. (Pet. at 11) All the court did was to recognize there was "no real danger of irreparable harm to the public interest in

the limited period until the Board rules in the pending unfair labor practice proceeding." 509 F.2d at 1375. Furthermore, the threat to interstate commerce was almost moot and the injunction was not necessary to maintain the free flow of commerce. The Third Circuit in its opinion below acknowledged that precisely these circumstances would justify denying injunctive relief under the "just and proper" test. (App. A at 8a) The circuits simply do not disagree on the interpretation of "just and proper." Moreover, the record in this case made it just and proper for the injunction to issue and prevent the Rules from interrupting the free flow of commerce until the NLRB has completed its review of the merits of the case as directed by this Court in its remand.

3. The Instant Case Raises No Unsettled Questions of Constitutional Law

In enacting Section 10(l), Congress balanced the tremendous harm to the free flow of commerce effected by secondary boycotts against the potential harm to employees effected by the temporary halting of their boycott. It chose to limit, but not eliminate, a district court's discretion to grant §10(l) injunctions. It also chose to require the Board to petition a district court for temporary injunctive relief.

Congress could have bypassed the courts and granted the Board authority to temporarily prohibit continuation of a secondary boycott pending ultimate determination of the boycott's legality. *United States v. Southwestern Cable Company*, 392 U.S. 157 (1968); *Lloyd Sabaudo Societa Anonima Per Azioni v. Elting*, 287 U.S. 329 (1932). Congress may delegate questions "susceptible of judicial determination" to administrative agencies, particularly where, as here, they involve public, not private, rights.

Crowell v. Benson, 285 U.S. 22, 50-51 (1932); *Hirsch*, 530 F.2d at 308.[9]

Under Article I, Section 8, of the United States Constitution Congress may ordain and establish inferior courts, and "[invest] them with jurisdiction either limited, concurrent, or exclusive, and [withhold] jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good." *Lockerty v. Phillips*, 319 U.S. 182, 187 (1943). Congress' authority to withhold jurisdiction, "in the exact degrees and character" it sees fit includes the authority to prescribe the standards by which a district court may issue injunctive relief in particular situations, including those underlying §10(l). *Douds v. Local 1250*, 170 F.2d 695 (2d Cir. 1948); *Printing Specialties and Paper Converters Union v. LeBaron*, 171 F.2d 331 (9th Cir. 1948), *cert. dismissed*, 336 U.S. 949 (1949).

The Supreme Court has applied these principles in a closely analogous case to reject the very constitutional argument which Petitioners raise. In *United Steelworkers of America v. United States*, 361 U.S. 39 (1959), a case involving the interpretation of §208 of the Labor Management Relations Act, the Court said: "Congress has resolved the question of the appropriate form of relief for the condition the statute is meant to correct" and has constitutionally made it mandatory that an injunction issue when certain facts are shown to exist. 361 U.S. at 59 (Justices Frankfurter and Harlan concurring.) The Court

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9. *Yakus v. United States*, 321 U.S. 414 (1944), relied upon by Petitioners, is not to the contrary. The Court there recognized Congress' broad authority to delegate powers to independent agencies: "The only concern of courts is to ascertain whether the will of Congress has been obeyed." 321 U.S. at 525. District courts must determine whether a regional director has reasonable cause and tailor just and proper relief. The merits of the Board's final resolution of a controversy are reviewable by the court of appeals under §10(e), 29 U.S.C. §160(e).

has upheld other similar congressional restrictions on a district court's equitable and judicial discretion. *Prima Paint Corp. v. Flood and Conklin Manufacturing Co.*, 388 U.S. 395 (1967); *Pope v. United States*, 323 U.S. 1, 10-12 (1944). *See also, Tennessean Newspapers, Inc. v. FHA*, 464 F.2d 657 (6th Cir. 1972).

Finally, the Third Circuit does not require the district court to abdicate its judicial function. By merely taking evidence to compute and enter a judgment due a court performs a judicial act. *Pope v. United States, supra.* Here, the district court must further conclude that a regional director has shown reasonable cause under what the court determines is a substantial and not frivolous legal theory. The district court may then tailor the injunction to effectuate the purposes of the Act. Each duty requires exercise of judicial power.

4. Petitioners' Jurisdictional Argument Raises No Substantial Legal Questions

Effectuation of an appeal of a final order of the Board does not forever relegate the judicial power to entertain the controversy exclusively to the court of appeals. The Third Circuit appropriately rejected Petitioners' frivolous contrary position. The following reasons, in addition to those stated in the Third Circuit's opinion, support its conclusions.

Sears, Roebuck and Co. v. Carpetlayers Local 419, 397 U.S. 655, *reh. denied*, 399 U.S. 917 (1970), cited by Petitioners, teaches not only that Section 10(l) relief expires on the Board's adjudication of the merits of the charge, but also that Congress enacted §10(l) to supplement §10(e) so that an aggrieved party could obtain relief prior to a final order by the Board. In the instant case, ATA and the NVOCCs, parties not even involved in the case

remanded by *NLRB v. ILA*, filed the charges which resulted in the Board's §10(l) petition. As new charging parties, they are entitled to have their cases considered, and the secondary boycott against their members enjoined until after a final order of the Board.

Great Western Broadcasting Corp. v. Hoffman, 214 F.Supp. 173 (N.D. Cal. 1963), cited by Petitioners, is inapposite.[10] There, a charging party sued to compel the General Counsel to petition for Section 10(l) relief after the Board's final order dismissing the same charges by the same charging party had been accepted for and was under review by a court of appeals pursuant to §10(f). The earlier Section 10(l) injunction had automatically dissolved on the Board's final order. Since the charging party merely sought to resurrect §10(l) relief during the pendency of the appeal, it was held that the case was within the jurisdiction of the court of appeals.

In the instant case, the Board is presently considering the remanded Board cases, as well as the December, 1980, charges which challenge new conduct not previously considered in the remanded cases. Following *NLRB v. ILA, supra*, the United States Court of Appeals for the District of Columbia Circuit did not even deem it necessary to order the *Associated Transport, Inc.* and *Dolphin Forwarding, Inc.* cases transferred to the Board. The Court viewed the transfer as automatic. (*Amicus* App. B; 9/10/80 letter from George A. Fisher, Clerk of the United States

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10. The general rule that an appeal to a circuit court deprives a district court of jurisdiction as to matters involved in the appeal is not a creature of statute and is not absolute in character. *Hoffman v. Beer Drivers and Salesmen's Local Union No. 888*, 536 F.2d 1268, 1276 (9th Cir. 1976).

Court of Appeals for the D.C. Circuit to Elliott Moore, office of the Board's General Counsel) The Board clearly has jurisdiction of the Rules controversy since it has issued no final order. That jurisdiction includes the requirement that it petition a district court for §10(l) relief. Petitioners' "novel jurisdictional issue" simply does not exist.

CONCLUSION

All circuits of the court of appeals agree on the proper interpretation of §10(l). Each defers to the Board's role as ultimate arbiter of labor disputes under the Act by granting the Board the benefit of the doubt on both issues of fact and law. Each considers equitable factors in molding injunctive relief to effectuate the purposes of the Act. The Supreme Court has not itself interpreted §10(l), but given the circuits' uniform approach to that section it need not do so.[11] [12] The petition should be denied.

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11. The Board has ordered expedited consideration of the old and new Rules unfair labor practice cases. The General Counsel has never indicated that the Board will not decide the case "for several years." (Pet. at 16-17) Joseph E. Mayer, Esq., Assistant General Counsel for the Board, stated at the February 23, 1981, hearing that it would not surprise him if the case took two years to decide, but that he hoped "it could be done in a briefer period of time . . ." (App. C at 175a) The hearing before the administrative law judge has been held, briefs have been filed and the parties are awaiting his decision.

12. Given the uniformity in approach to §10(l), Petitioners' suggestion that the Board may forum shop for §10(l) relief is misguided and unsupported by the practice of the General Counsel.

Respectfully submitted,

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AMICUS CURIAE APPENDIX A

United States Constitution, Article I, Section 8

Section 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To makes Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof. (Emphasis added)

SEP 16 1980

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit
Washington, D. C. 20001

George A. Fisher
Clerk

September 10, 1980

Elliott Moore, Esquire
Office of the General Counsel
National Labor Relations Board
Washington, D.C. 20570

Re: Appeal No. 77-1735, et al. - *International Longshoremen's Assoc., AFL-CIO v. NLRB*

Dear Mr. Moore,

Confirming telephone advice to your office today, this Court's mandate in the above-referenced case was issued to the National Labor Relations Board on January 2, 1980. Subsequent to the issuance of this mandate, the Supreme Court granted a petition for writ of certiorari in these cases and affirmed the judgment of this Court on July 30, 1980. In my view, the mandate of this Court, previously issued in January, remains in full effect. Please let me know if you feel otherwise.

Sincerely yours,

/s/ George A. Fisher
George A. Fisher
Clerk

GAF/tag
cc: counsel of record

Office-Supreme Court, U.S.
FILED
JUL 9 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-2095

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NEW YORK SHIPPING ASSOCIATION, INC., COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, ATLANTIC COAST DISTRICT, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, *Petitioners,*

v.

WILLIAM A. PASCARELL, Acting Regional Director of the Twenty-Second Region of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD, *Respondent.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

AMICI CURIAE BRIEF OF CHARGING PARTIES INTERNATIONAL ASSOCIATION OF NVOCCs AND TWIN EXPRESS, INC. IN OPPOSITION TO THE PETITION

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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COUNTERSTATEMENT OF ISSUES

1) Whether the Court below correctly affirmed the district court's grant of injunctive relief under Section 10(1) of the National Labor Relations Act (Act) when the district court found that the Regional Director of National Labor Relations Board (Board) had "reasonable cause" to believe a violation of the Act ex-

isted, and further found that the legal theory advanced by the Regional Director was "substantial and not frivolous"?

2) Whether the Court below correctly affirmed the district court's issuance of injunctive relief as "just and proper" under section 10(1) because it comports with the Congressional judgment that hot cargo agreements so disrupt commerce that they must be halted pending the Board's adjudication of the merits?

INTEREST OF THE INTERNATIONAL ASSOCIATION OF NVOCCs AND TWIN EXPRESS, INC.

The International Association of Non-Vessel Operating Common Carriers (NVOCCs) and Twin Express, Inc. (Twin) are charging parties in the unfair labor practices proceedings before the Board and participated in the injunction proceedings before the district court and as amici curiae in the court of appeals. The unfair labor practices cited in the complaint are so-called secondary boycotts and hot cargo agreements (violation of Sections 8(b)4 and 8(e) of the Act) causing the cessation of operations of certain NVOCCs. As charging parties who seek relief from the unfair labor practices, the Association and Twin have a vital interest in the outcome of this case, since the very existence of NVOCCs operations is at stake.

ARGUMENT

Summary Of The Relevant Statutory Standards

Section 10(1) Statutory Standards

Under Section 10(1) of the Act, the limited question presented to the district court is whether the Regional Director has reasonable cause to believe that the

elements of an unfair labor practice are present and that the legal theory presented is substantial and not frivolous. *See, e.g., Hirsch* v. *Buildings & Construction Trades Council*, 530 F.2d 298 (3d Cir. 1976); *Samoff* v. *Building & Construction Trades Council*, 475 F2d 203 (3d Cir.), *vacated as moot*, 414 U.S. 808 (1973).

Thus, if the Board's theory cannot be characterized as insubstantial and frivolous, "the district court must grant the injunction since this will best effectuate the Congressional policy against disruption of commerce expressed in Section 10(1)." *Id.* at 207 Under this standard, "the Regional Director faces a relatively insubstantial burden of proof when he petitions a district court for temporary injunctive relief pursuant to Section 10(1)." *Id.* See also *Squillacote* v. *Graphic Arts Int'l. Union*, Local 277, 540 F. 2d 853 (C.A. 7, 1976); *Union de Tronquistas de Puerto Rico* v. *Arlook*, 586 F. 2d 872, (1st Cir. 1978); *Solien* v. *United Steelworkers of America*, AFL-CIO-CLC, 593 F. 2d 82, (8th Cir., 1979), cert. den., 100 S. Ct. 54.

The district court did not find that the legal theory of the Board Regional Director was erroneous (Pet. Br. pp. i, 8) but rather that it was reasonable and not frivolous (191a).

Petitioners' citation of *Danielson* v. *Joint Board of Coat, Suit & Allied Garment Workers*, 494 F.2d 1230, (2d Cir. 1974); *Humphrey* v. *International Longshoremen's Association*, 548 F2d 494, (4th Cir. 1977); *Kaynard* v. *Palby Lingerie, Inc.*, 625 F2d 1047, (2d Cir. 1980) (analogous NLRA Section 10(j) proceeding) (Pet. Br. p. 9) is not relevant. Further, in *Danielson* and *Humphrey* the courts emphasized that the district courts should accord considerable deference to the Regional Director's construction of the statute. And

in *Humphrey* where the unfair labor practice involved the same container rules in issue here the Fourth Circuit *reversed* the district court's denial of a 10(1) injunction.

And in *Kaynard* the Second Circuit *affirmed* the district court's grant of a 10(j) injunction based on a reasonable cause finding.

Petitioners also misstate the issue with respect to the Third Circuit's implied directive to its district courts to ignore consideration of whether issuance of 10(1) injunction is just and proper (Pet. Br. pp. i, 11-13).

However, a refusal to apply traditional equitable principles is not tantamount to a refusal to consider whether the issuance of an injunction would be "just and proper." Yet Petitioners' argument that the district court should have balanced the equities reveals their misunderstanding of the limited role of the district court in a section 10(1) proceeding. Indeed, had the district court pursued the course advocated by Petitioners and denied the injunction, the district court would have abused its discretion.

The underlying purpose of section 10(1) cannot be understood without reference to the statutory scheme of the National Labor Relations Act. Section 10(1) reflects the judgment of Congress that certain unfair labor practices, including secondary boycotts and hot cargo agreements, are so disruptive of commerce that they must be halted pending the Board's adjudication on the merits to avoid *irreparable injury to the policies of the Act. See Hirsch* v. *Building & Construction Trades Council*, 530 F2d 298, 302 (3d Cir. 1976); *Samoff* v. *Building & Construction Trades Council*, 530 F.2d 298, 302 (3d Cir.), *vacated as moot*, 414 U.S. 808 (1973) (emphasis added). Because Section 10(1) was included in the

statute to protect the public's interest in the free flow of commerce and *not* for the protection of vindicating private rights, Congress, in enacting the statute, has balanced the equities.

Thus, the district court below correctly determined that it was precluded from applying traditional equitable principles under the section 10(1) statutory scheme. (188a-189a). The application of traditional equitable principles here would only serve to frustrate the congressional scheme.

Thus, a court faced with a petition for injunctive relief under Section 10(1) must exercise its discretion in light of the general objectives of that statute. Cf. *Youngstown Sheet and Tube Co.* v. *Sawyer*, 343 U.S. 579, 609-10 (1952) ("when Congress itself has struck the balance, has defined the weight to be given the competing interests, a court of equity is not justified in ignoring that pronouncement under the guise of equitable discretion"). Therefore, injunctive relief is just and proper when there is reasonable apprehension that the statute's remedial purposes will be frustrated in the absence of such relief. *See Wilson* v. *Milk Drivers & Dairy Employees Union. Local 741*, 491 F 2d 200, 203 (8th Cir. 1974).

Petitioners also argue that the district court lacked jurisdiction to entertain a 10(1) application here. This argument is frivolous and was flatly rejected by the district court (191a-192a) and the Circuit Court below (6a-7a).

Petitioners state that the petition should be granted because of a conflict in the circuits (Pet. Br. p. 8), referring to a "four way split in the circuits" (Pet. Br. p. 9

There is in fact no such conflict or split. Petitioners themselves concede that the First, Third, Fifth, Seventh, Eighth and Ninth Circuits are essentially in accord (Pet. Br. p. 9). The Sixth and Tenth Circuits are not in conflict since according to Petitioners (Pet. Br. p. 9, 10) they have not elaborated on the literal language of the statute The District of Columbia Circuit has never decided a 10(1) case. This leaves the Second and Fourth Circuits with the *Danielson* and *Humphrey* cases respectively cited in support of the "conflict." In *Humphrey*, as stated above, the Fourth Circuit reversed the district court's denial of an injunction with respect to the same container rules in issue here. As for *Danielson*, the decision should be read in the context of the case, in which the Court characterized the theory of law advanced as being a "new adventure . . . in the interpretation of a statute fourteen years after it had come on the books." (494 F2d at 1245) and as an "effort to stretch" the prohibitions of the Act so far that even if the Board found a violation "the order would not be enforced unless some new facts or legal theories should appear" (494 F 2d at 1239).

Thus, the alleged "conflict" is really non-existent.

CONCLUSION

The Court below correctly affirmed the district court's grant of the injunction and therefore, for all of the above reasons, the petition for a writ of certiorari should be denied.

Dated: July 9, 1981

Respectfully submitted,

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